PP

v.

KAMARUZAMAN MAHMUD & ANOR

HIGH COURT MALAYA, IPOH
VT SINGHAM J
[PERAK CRIMINAL APPEAL NO: M2-41-25-2005]
23 FEBRUARY 2006

CRIMINAL LAW: *Sentence - Armed robbery - Order of binding over - Whether order appropriate in view of gravity and rampancy of offence - Criminal Procedure Code, s. 294*

Both the accused herein were charged for armed robbery under ss. 392/397 of the Penal Code. They pleaded not guilty at first and claimed trial. Their case was postponed several times over a period of four years before it finally came up for hearing, by which time, they changed their plea from not guilty to guilty. They were then convicted. The learned magistrate ordered their release on a bond with one surety in the sum of RM10,000 and to keep peace and good behaviour for a period of one year pursuant to s. 294 of the Criminal Procedure Code ('CPC'). The Deputy Public Prosecutor, dissatisfied with the order of binding over, appealed to this court.

Held (allowing the appeal by the Deputy Public Prosecutor):

(1) There is a pressing need to protect the public from serious harm such as offences of robbery and violence. Such offenders should be kept away from society and if the facts so warrant, for a longer period. While the need to impose a non-custodial sentence against a first offender and those who plead guilty is taken into consideration, so is the need to ensure that public safety, property and belongings are well protected. The offence of robbery with a deadly weapon – in the present case a 'parang' – is calculated to inspire great alarm and is especially rife in most robbery offences. The admission by the accused that the 'parang' was carried for their protection was not a mitigating factor for if the victims had resisted, protested, challenged or raised an alarm, the 'parang' would have been used upon them with disastrous results. (para 40)

(2) Authorities suggest higher sentencing for armed robbery. Armed robbery is not merely a crime against property but also a crime against persons. The learned magistrate misinterpreted and misapplied s. 294 CPC in favour of the accused without any regard to the gravity and rampancy of the offence and public interest. The learned magistrate was over sympathetic to the accused and swayed towards the family expressing personal sentiments and feelings. The fact that the accused was a first offender and had pleaded guilty to the offence was not sufficient ground to invoke s. 294 CPC. Furthermore, the plea of guilty was not entered at the first reasonable opportunity when the accused was charged but four years later. It is not a strict rule that in every case where the accused has pleaded guilty and is a first offender, a non-custodial sentence must be ordered. The order of binding over would not only send a wrong message to would be offenders of such crimes but would encourage such offenders to commit crimes on the belief that they would escape the custodial sentence. It is important to remember that it is not only the offender to be deterred by the imposition of an appropriate custodial sentence but others who might be tempted to offend in a similar way. (paras 41, 44, 48, 69 & 88)

Case(s) referred to:

Abdul Karim v. Regina; Sundra Singh v. Regina; Loh Kai Hoi v. Regina [1954] 20 MLJ 86 ***(refd)***

Ahmad Hj Bakar v. PP [1988] 2 MLJ 216 ***(refd)***

Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 ***(refd)***

Ang Chai Seng v. PP [2000] 1 CLJ 213 CA (Refd)

Awaluddin Suratman & Ors v. PP [1991] 3 CLJ 2459; [1991] 2 CLJ (Rep) 310 HC ***(refd)***

Bachan Singh v. PP [1965] 31 MLJ 217 ***(refd)***

Bhandulananda Jayatilake v. PP [1982] 1 MLJ 83 ***(refd)***

Broxham (Unreported, NSW CCA, 3 April 1986) ***(refd)***

Cameron v. The Queen [2002] 209 CLR 339 ***(refd)***

Choh Wai Sung v. PP [1946] 12 MLJ 119 ***(refd)***

Close [1992] 65 A Crim R 55 ***(refd)***

Coleman [1991] 56 A Crim R 369 ***(refd)***

Doorey (Peter James Christian) [2000] NSWCCA 456 ***(refd)***

Dr Jainand v. R AIR [1949] All 291 ***(refd)***

Ellis [1993] 68 A Crim R 449 ***(refd)***

English (Jason Wayne) [2000] NSWCCA 245 ***(refd)***

Fan Yew Teng v. PP [1975] 2 MLJ 235 ***(refd)***

Flack And Smith (Unreported, NSW CCA, 12 December 1989) ***(refd)***

George (Scott Tony) And Johnson (Brett) [1999] NSWCCA 243 (30 June 1999) ***(refd)***

Go Pak Hoong Tractor And Building Construction v. Syarikat Pasir Perdana [1982] 1 MLJ 17 ***(refd)***
Goh Beng Seng v. Dol Dolah [1970] 2 MLJ 95 ***(refd)***
Hamsa Kunju v. PP [1963] 29 MLJ 228 ***(refd)***
Jangir Singh v. Rex [1947] 13 MLJ 159 ***(refd)***
Jayanathan v. PP [1973] 2 MLJ 68 ***(refd)***
Joginder Singh v. PP [1984] 2 MLJ 133 ***(refd)***
Kahar Tongah v. PP [1992] 4 CLJ 1865; [1992] 2 CLJ (Rep) 618 ***(refd)***
Kiew Foo Mui & Ors v. PP [1996] 1 CLJ 14 ***(refd)***
Koay Teng Soon & Anor v. PP [2000] 1 CLJ 677 CA ***(refd)***
Kuruma v. The Queen [1955] AC 197 ***(refd)***
Lee Ah Tee v. Ong Tiow Pheng & Ors [1984] 1 CLJ 26; [1984] 1 CLJ (Rep) 187 FC ***(refd)***
Lee Chow Meng v. PP [1976] 1 MLJ 287 ***(refd)***
Lee Fook Sam v. PP [1963] 29 MLJ 371 ***(refd)***
Lee Wai Kam v. PP [1976] 2 MLJ 19 ***(refd)***
Lee Yew Siong v. PP [1973] 1 MLJ 37 ***(refd)***
Leong Ka Kong v. PP [1976] 2 MLJ 21 ***(refd)***
Liaw Kwai Wah & Anor v. PP [1987] 1 CLJ 35; [1987] CLJ (Rep) 163 SC ***(refd)***
Lim Yoon Fah v. PP [1971] 1 MLJ 37 ***(refd)***
Liow Chow & Anor v. PP [1939] 8 MLJ (FMSR) 170 ***(refd)***
Loh Hock Seng & Anor v. PP [1980] 2 MLJ 13 ***(refd)***
Low Oi Lin v. R [1949] MLJ 210 ***(refd)***
Low Thim Fatt v. PP [1989] 1 MLJ 304 ***(refd)***
Mahant Hakumat Raj v. Emperor AIR [1943] Lah 14 ***(refd)***
Malaysian National Insurance Sdn Bhd v. Malaysia Rubber Development Corporation [1986] 2 CLJ 285; [1986] CLJ (Rep) 185 SC ***(refd)***
Mangan (Kenneth) [1999] NSWCCA 194 (21 July 1999) ***(refd)***
Melvani v. PP [1971] 1 MLJ 137 ***(refd)***
Muthusamy v. PP [1948] 14 MLJ 57 ***(foll)***
Mohamed Abdullah Ang Swee Kang v. PP [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 SC ***(refd)***
Mohamed Ekram v. PP [1962] 28 MLJ 129 ***(refd)***
Myers v. Director Of Public Prosecutions [1965] AC 1001 ***(refd)***
Ong Lai Kim v. PP & Other Appeals [1991] 2 CLJ 1568; [1991] 3 CLJ (Rep) 376 HC ***(refd)***
Ooi Joo Keong v. PP [1997] 2 SLR 68 ***(refd)***
Packiam & Anor v. PP [1972] 1 MLJ 247 ***(foll)***
Petrinovic (Frank) (Unreported, NSW CCA, 18 September 1990) ***(refd)***
Por Choo Air v. PP [1993] 2 MLJ 131 ***(refd)***
PP v. Chot Saik Kam [1991] 1 MLJ 193 ***(refd)***
PP v. Fam Kim Hock [1957] 23 MLJ 20 (Refd)
PP v. Govindnan Chinden Nair [1998] 2 CLJ 370 HC ***(refd)***
PP v. Hettiarachigae LS Pereira [1977] 1 MLJ 12 ***(refd)***
PP v. Jafa Daud [1981] 1 MLJ 315 ***(refd)***
PP v. Karumah [1980] 2 MLJ 102 ***(refd)***

A *PP v. Khairuddin [1981] CLJ 86; [1981] CLJ (Rep) 234 HC* ***(refd)***
PP v. Lee Tak Keong [1989] 1 MLJ 307 ***(refd)***
PP v. Leo Say & Ors [1985] 2 CLJ 155; [1985] CLJ (Rep) 683 HC ***(refd)***
PP v. Leonard Glenn Francis [1989] 1 CLJ 972; [1989] 2 CLJ (Rep) 320 HC ***(refd)***
B *PP v. Lim Guan Hock & PP v. Boo Swee Kim [1949] 15 MLJ 231* ***(refd)***
PP v. Loo Choon Fatt [1976] 2 MLJ 256 ***(refd)***
PP v. Low Yong Ping [1961] 27 MLJ 306 ***(refd)***
PP v. Mohtar Abdul Latif [1980] 2 MLJ 51 ***(refd)***
PP v. Muhari Mohd Jani & Anor [1999] 8 CLJ 430 HC ***(refd)***
PP v. Mustapha Abdullah [1996] 3 CLJ 458 HC ***(refd)***
C *PP v. Nazarudin Ahmad [1993] 2 CLJ 543 HC* ***(refd)***
PP v. Ooi Kwang Lai [2000] 6 MLJ 622 ***(refd)***
PP v. Rajandran & Anor [1985] 2 MLJ 260 ***(refd)***
PP v. Ravindra N Rethinam & Ors [1992] 4 CLJ 2043; [1992] 3 CLJ (Rep) 426 ***(refd)***
D *PP v. Taib Ali [2001] 6 MLJ 628* ***(refd)***
PP v. Tan Kim San [1980] 2 MLJ 98 ***(refd)***
PP v. Tan Kok An [1996] 2 CLJ 89 HC ***(refd)***
PP v. Tan Fook Sum [1999] 2 SLR 523 ***(refd)***
PP v. Tanggaah [1972] 1 MLJ 207 ***(refd)***
PP v. Teh Ah Cheng [1976] 2 MLJ 186 ***(refd)***
E *PP v. Tengku Mahmood Iskandar & Anor [1973] 1 MLJ 128* ***(refd)***
PP v. Vun Tain Yin & Anor [1986] 1 CLJ 94; [1986] 1 CLJ (Rep) 633 HC ***(refd)***
PP v. Yap Chong Fatt [1963] MLJ 136 ***(foll)***
PP v. Yeong Yin Choy [1976] 2 MLJ 267 ***(refd)***
F *Purwanti Parji v. PP [2005] 2 SLR 220* ***(refd)***
R v. Clark [1975] 27 FLR 380 ***(refd)***
R v. Cuthbert [1967] 86 Wn (Pt 1) NSW 272 ***(refd)***
R v. Ellis [1910] 2 KB 746 ***(refd)***
R v. Hayes [1984] 1 NSWLR 740 ***(refd)***
R v. Henry [1999] 46 NWLR 346 ***(refd)***
G *R v. Kenneth John Ball 35 Cr App R 164* ***(refd)***
R v. Lawrence [1980] 1 NSWLR 122 ***(refd)***
R v. Longford [1970] 71 SR (NSW) 288 ***(refd)***
R v. McHugh [1985] 1 NSWLR 558 ***(refd)***
R v. Sang [1980] AC 402 ***(refd)***
H *R v. Spiero [1979] 22 SASR 543* ***(refd)***
Rauf Hj Ahmad v. PP [1950] 16 MLJ 190 ***(refd)***
Re Eng Chong Lam [1964] 30 MLJ 10 ***(refd)***
Reg v. Davies [1978] 67 Cr App R 207 ***(refd)***
Reg v. Sargeant [1974] 60 Cr App R 74 ***(refd)***
Sau Soo Kim v. PP [1975] 2 MLJ 134 ***(refd)***
I *Sharma Kumari Oam Prakash v. PP [2000] 6 MLJ 282* ***(refd)***
Sharon Elizabeth Costen [1989] 11 Cr App R (S) 182 ***(refd)***
Shaw v. Director of Public Prosecutions [1961] 2 All ER 446 ***(refd)***

Societe Belge De Banque SA v. Rao Girdhari Lal Chaudhary Air [1940] Privy Council 90 ***(refd)***
Stirland v. DPP [1944] AC 315 ***(refd)***
Syarikat Jengka Sdn Bhd v. Abdul Rashid Harun [1981] 1 MLJ 201 ***(refd)***
Tan Chew Man v. PP [1977] 2 MLJ 247 ***(refd)***
Tan Foo Su v. PP [1967] 2 MLJ 19 ***(refd)***
Tan Lay Chen v. PP [2000] 4 CLJ 492 HC ***(refd)***
Tan Koon Swan v. PP [1987] 1 CLJ 511; [1987] CLJ (Rep) 1081 CA ***(refd)***
Tan Pak v. Cham Boon San And Other Actions [1992] 2 MLJ 271 ***(refd)***
Tan Thye Seng & Anor v. PP, PP v. Tan Hean Seng [1967] 2 MLJ 173 ***(refd)***
Tara Rajaratnam v. Datuk Jagindar Singh & Ors [1983] 1 CLJ 257 HC ***(refd)***
Teo Chin Hwa v. PP [2000] 1 CLJ 224 HC ***(refd)***
Teoh Siew Lean & Anor v. PP [1958] 24 MLJ 145 ***(refd)***
Valentini [1989] 46 A Crim R 23 ***(refd)***
Veerian T Latchmanen v. PP [2001] 7 CLJ 466 HC ***(refd)***
Vu (Manh Hung) (Unreported, NSW CCA, 11 November 1993) ***(refd)***
Ward v. James [1966] 1 QB 273 ***(refd)***
Webster (Patrick John) [1999] NSWCCA 313 (27 September 1999) ***(refd)***
Wong Kok Keong v. Regina [1955] 21 MLJ 13 ***(refd)***
Yong Pak Yong v. PP [1959] 25 MLJ 176 ***(refd)***
Zaidon Shariff v. PP [1996] 4 CLJ 441 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 259, 284(d), 294(d)
Evidence Act 1950, s. 3
Penal Code, s. 392, 397

*[**Editor's note:** Both the accused applied to the Court of Appeal vide Criminal Application No: W-07-14-2005 for leave to appeal against the High Court decision given on 23 August 2005. The Court of Appeal (Coram: Gopal Sri Ram, Hashim Yusoff & Zaleha Zahari JJCA) dismissed the application on 21 September 2005.]*

For the prosecution - Abdul Rahman Putra (Budiman Lokman DPP with him)
Respondents in person

Reported by Usha Thiagarajah

JUDGMENT

VT Singham J:

[1] In this case, both the accuseds were charged at the Magistrate's Court, Batu Gajah on 21 October 2000 for robbery armed with a deadly weapon, an offence under s. 392/397 of the

Penal Code and punishable under the same section. The first and second accused were 30 years and 23 years old respectively at the time of the commission of the offence.

[2] The charge is as follows:

> Bahawa kamu bersama-sama dua lagi yang masih bebas, dengan niat bersama pada 11hb Ogos 2000 jam lebih kurang 3.30 petang di Pusat Permainan Video No: 1, Taman Seri Desa, Tronoh di dalam Daerah Kinta dalam Negeri Perak, telah melakukan rompakan ke atas (1) Thirunavu Karasu a/l Nagarajan KP: 660428-08-5513 (2) Hong Gah Hon KP: 780329-08-6357 (3) Tan Yoong Hooi KP: 790829-08-6353 (4) Kok Yau Wah KP: 790531-08-6077 (5) Sho Wah Kean KP: 770708-08-5339 (6) Tang Chee Keong KP: 750424-08-5371 (7) Chan Yeang Yew KP: 810710-08-6203 (8) Chang Khoon Meng KP: 720906-08-5609 dan **pada masa melakukan rompakan itu telah bersenjatakan parang yang boleh mendatangkan kematian.** Dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 392/397 Kanun Keseksaan dan boleh dihukum di bawah peruntukkan yang sama dan dibaca bersama-sama Seksyen 34 Kanun Keseksaan. (emphasis added)

[3] Both the accused had pleaded not guilty to the charge from the first day they were charged in court on 21 October 2000 and continued to claim trial on all the dates when the case was called up for hearing over a period of four years but the hearing never proceeded. Finally, on 9 December 2004, both the accused who were represented by counsel had pleaded guilty to the charge. As the facts of the case was not ready on 9 December 2004, the case was adjourned to the next day on 10 December 2004 on the application of the prosecuting officer.

[4] On 10 October 2004, both the accused maintained their plea of guilty and admitted to the facts (exh. P1) of the case as presented by the prosecution and they were found guilty and convicted. The learned Magistrate ordered both the accused to be released on entering into a bond with one surety in the sum of RM10,000 and without any security and to keep the peace and be of good behaviour for a period of one (1) year pursuant to s. 294 of the Criminal Procedure Code. The Deputy Public Prosecutor being dissatisfied with the said Order of Binding Over under s. 294 of the Criminal Procedure Code filed a notice of appeal against the said order to the High Court on 17 December 2004. Hence, this appeal.

[5] The facts of the case (exh. P1) as presented by the prosecution is as follows:

Fakta Kes No	:	83-228/2000
Kesalahan	:	Seksyen 392/397 dan Seksyen 34 Kanun Keseksaan
Pengadu	:	Thirunavu Karasu a/l Nagarajah, Kpt: 660428-08-5513
Alamat	:	Blok N2, Rumah Murah 3, Lawan Kuda Baru, Gopeng, Perak.
Tertuduh (B1)	:	Kamaruzaman bin Mahmud, Kpt: 760623-11-5005
Alamat	:	No. 960D, Jalan Teluk Lipat, Dungun, Terengganu.
Tertuduh (B2)	:	Muhd Jasmi bin Mohamad, Kpt: 770870-03-6127
Alamat	:	Kampung Cempaka, Lata Rek Kuala Krai, Kelantan.

Kejadian Ringkas:

Pada 11/08/2000, jam lebih kurang 3.30 petang ketika Pengadu bertugas di Kelab Hiburan dan Rekriasi No. 1, Taman Seri Desa, Tronoh, Perak sebagai juruwang tempat pembayaran telah nampak 4 lelaki Melayu yang tidak dikenali telah masuk ke dalam kelab tersebut. Salah seorang dari mereka telah memasuki bilik juruwang dan mengeluarkan sebilah parang panjang dan mengarahkan Pengadu ke bahagian tengah kelab tersebut lalu mengambil wang tunai dari laci pembayaran sebanyak RM500 (lima ratus) dan wang dari Pengadu sebanyak RM40 serta rantai lehernya bernilai RM800. Kemudian keempat-empat lelaki tersebut terus keluar lalu melarikan diri. Pengadu datang ke Balai Polis Tronoh dan buat satu laporan Polis sebagaimana Tronoh Repot No. 336/2000.

Tindakan/Siasatan:

Siasatan telah dijalankan oleh Insp. Jamalulail bin Ibrahim, Pegawai Penyiasat Jenayah IPD Kinta, Batu Gajah. Tempat kejadian dilawati. Rakaman Percakapan Saksi-saksi telah dirakamkan. Rajah Kasar dan Kunci Rajah Kasar telah diambil.

Bertindak atas maklumat dari DCC IPD Kinta, Batu Gajah. Pada 11/08/2000, jam lebih kurang 5.00 petang ketika anggota MPV PK 307 membuat tugas rondaan telah tahan sebuah m/kar warna putih, no. WFT 2939 (No. Palsu) yang dinaiki oleh (4) lelaki melayu yang dalam keadaan mencurigakan di Km. 41, Jalan Ipoh-Kuala Lumpur. Ketika dalam pemeriksaan Tertuduh (B1) dapat ditahan dan (3) daripadanya berjaya melarikan diri. Hasil Pemeriksaan ke atas Tertuduh (B1) dan M/kar tersebut mendapati ianya bersangkut Tronoh Repot no. 336/2000.

Bertindak atas maklumat, pada 11/08/2000 jam 6.00 petang Kpl. 72412 telah mengetuai sepasukan anggota Polis dari cawangan Jenayah IPD Kinta, Kampar setelah perkenalkan diri 'POLIS' telah tahan Tertuduh (B2) yang dalam keadaan mencurigakan dan cuba melarikan diri di persimpangan Jalan Baharu-Jalan Gopeng, Kampar. Tangkapan Tertuduh (B2) sebagaimana Kampar Repot no. 1342/2000. Siasatan Lanjut dapati Tertuduh (B2) terlibat bersangkut Tronoh Repot No. 336/2000.

Hasil Siasatan:

Mendapati Tertuduh (B1) dan (B2) telah mengaku bersama-sama dengan (2) lagi yang masih bebas, dengan niat bersama telah melakukan satu kesalahan di bawah Seksyen 392/397 Kanun Keseksaan dan boleh dihukum di bawah Akta yang sama dan dibaca bersama-sama Seksyen 34 Akta yang sama sebagaimana Pertuduhan.

Di Kemukakan:

Seperti di lampiran

t.t.

(Ganasan a/l Ramachandran) C/Insp
Pegawai Pendakwa
Mahkamah Majistret
Batu Gajah
10/12/04

'Lampiran'

Tronoh Repot No: 336/2000

No. Kes: 83-228/2000

1. (3) plastik mengandungi wang siling nilai RM1 sebanyak RM2,236
2. (1) bentuk cincin warna kuning

3. Wang kertas Amerika bernilai $1
4. Wang kertas Singapura $10
5. Wang kertas Brunei $1
6. (2) keping cek Oriental Bank Berhad bernilai RM10,000 (RM5,000 tiap-tiap satu)
7. (4) unit h/phone chager tanda 'E31', 'E32', 'E33', dan 'E34'
8. (1) sarung parang warna hitam pendek 'E38'
9. (1) sarung parang warna hitam panjang 'E39'
10. (1) bag galas jenis Nike 'S1'
11. (1) parang jenis Tramontina berhulu kayu kuning panjang 58cm 'S2'
12. (1) parang jenis Tramontina berulu kayu kuning panjang 58cm 'S3'
13. (1) parang berulu plastik hitam panjang 60cm 'S4'
14. (1) parang/pedang berulu kayu kuning panjang 84cm 'S5'
15. (1) parang berulu plastik hitam panjang 60cm 'S6'
16. (1) parang berulu plastik hitam dengan sarung panjang 42cm 'S7'
17. (1) parang berulu plastik hitam panjang 60cm dengan sarung 'S8'
18. (1) helmet jenis Sport warna gray 'S9'
19. sepasang ski mask warna biru coklet 'S10'
20. (1) pemotong besi warna merah 'S11'
21. (1) kayu bassball jenis Franklin 'S12'
22. (1) bag galas jenis Timberland 'S13'
23. (1) bag galas kecil jenama Adidas mengandungi (2) rangkai anak kunci 'S14'
24. (1) bag galas kecil warna biru muda 'S15'
25. (1) set no. pendaftaran palsu (WFT 2939) 'T'
26. (3) hand phone jenis Ericson hitam 'T1', 'T2', 'T4', dan
27. (1) handphone jenis Ericson warna silver 'T3'

[6] In mitigation, learned counsel for both the accuseds at the lower court submitted as follows:

As for the first accused

He is 34 years old.

A contract worker.

The first accused's wife works as Accounts Executive at MK Land.

He has 4 children.

As for the second accused

He is 27 years old.

A contract worker.

He works in Kuala Lumpur.

[7] In urging the learned Magistrate to bound over both the accused under s. 294 of the Criminal Procedure Code, learned counsel also referred to the following cases:

1. *Bachan Singh v. Public Prosecutor* [1965] 31 MLJ 217
2. *Public Prosecutor v. Yeong Yin Choy* [1976] 2 MLJ 267
3. *Lim Yoon Fah v. Public Prosecutor* [1971] 1 MLJ 37

[8] Section 294 of the Criminal Procedure Code reads:

First offenders

(1) When any person not being a youthful offender has been convicted of any offence punishable with imprisonment before any Court if it appears to the Court that regard being had to the character, antecedents, age, health or mental condition of the offender or to the trivial nature of the offence or to any extenuating circumstances under which the offence was committed it is expedient that the offender be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond with or without sureties and during such period as the Court may direct to appear and receive judgment if and when called upon and in the meantime to keep the peace and be of good behaviour.

[9] Learned counsel had also submitted at the lower court that although weapon was used, there was no injury to the victims and further submitted as follows:

(1) both the accused have no previous conviction;

(2) both the accused are remorseful;

(3) since the offence of robbery was committed and till now (at the time of this submissions) both the accused were not involved in any criminal case;

(4) both the accused should be given an opportunity so that they could be useful to the society.

[10] On going through the notes of proceedings in the record of appeal, this court did not find any reply or submissions from the prosecuting officer on the sentence and the learned Magistrate immediately ordered the binding over under s. 294 of the Criminal Procedure Code in the sum of RM10,000 in one surety for one (1) year and without security.

[11] On 5 August 2005 when the appeal was called up in this court, both the accused who were unrepresented by counsel informed the court that they were ready to proceed. The learned Deputy Public Prosecutor then handed a written outline submission and *inter alia* submitted as follows:

(1) The sentence is inadequate. The maximum sentence as provided for the offence under s. 392 of the Penal Code is imprisonment not exceeding ten (10) years and shall be liable to fine. In the instant case, both the accused were armed with weapons (parang) in the course of committing the offence of robbery and that whipping could also be imposed as provided under s. 397 of the Penal Code;

(2) the learned Magistrate had failed to take into consideration public interest when he referred to the facts and circumstances presented before the court;

(3) the learned Magistrate had given preference to the mitigating factors of both the accused instead of public interest;

(4) both the accused were charged in court on 21 October 2000 and that they pleaded guilty only on 10 December 2004 after having claimed trial over a period of four years;

(5) this is an appropriate case for this court to interfere with the discretion exercised by the learned Magistrate in the sentence and referred to the following cases:

(a) *Veerian T. Latchmanen v. PP* [2001] 7 CLJ 466

(b) *Public Prosecutor v. Rajandran & Anor* [1985] 2 MLJ 260

(c) *Public Prosecutor v. Lee Tak Keong* [1989] 1 MLJ 307

[12] Under the circumstances, the learned Deputy Public Prosecutor submitted that the learned Magistrate had erred in law by releasing the accused on bond as it was unsuitable to the proved facts and circumstances and urged upon this court to set aside the said order and substitute it with an appropriate and suitable custodial sentence after taking into consideration the public interest.

[13] In reply, the first accused appealed to this court to maintain the order of binding over of the learned Magistrate and informed this court that he committed the robbery because:

(1) saya melakukan samun kerana saya selalu bermain dengan mesin kuda dan selalu kalah dan banyak duit telah hilang. Saya habis semua duit dan tidak boleh main lagi;

(2) saya ingin melantik seorang peguam untuk kekalkan hukuman saya untuk rayuan ini;

(3) saya hanya tahu semalam mengenai kes ini dan ingin melantik peguam;

(4) selepas hari ini, saya ingin melantik peguam.

[14] In reply, the second accused informed this court as follows:

(1) Oleh kerana saya memerlukan wang dan pengaruh oleh kawan, saya melakukan samun;

(2) saya tidak mempunyai pekerjaan tetap dan tinggal di Kuala Lumpur;

(3) saya ingin melantik peguam selepas hari ini;

(4) saya pohon tarikh panjang untuk membuat persediaan menghadapi bicara dan sediakan wang untuk melantik peguam.

[15] In opposing the application for an adjournment, learned Deputy Public Prosecutor submitted as follows:

(1) Ada keraguan tentang permohonan oleh kedua-dua responden kerana selepas merayu tentang hukuman, baru pohon untuk melantik peguam;

(2) sangsi motif responden-responden untuk tarikh lain;

(3) Perintah Ikat Jamin akan tamat pada 9 Disember 2005;

(4) kedua-dua responden telah memaklumkan kepada mahkamah mereka tidak ada pekerjaan tetap dan duit mereka telah habis;

(5) bagaimana mereka tanpa duit ingin melantik peguam dan mereka juga pohon masa yang panjang;

(6) tidak wajar penangguhan dibenarkan dan pohon rayuan diteruskan kerana rayuan adalah terhadap hukuman sahaja dan mereka telah mengaku salah;

(7) rayuan yang dibenarkan di bawah s. 305 Kanun Prosedur Jenayah adalah terhadap hukuman sahaja.

[16] Upon hearing the objection of the learned Deputy Public Prosecutor against the application for an adjournment which was explained to both the accused, they still persisted for the appeal to be adjourned to enable them to engage counsel. As both the accused had attended this court for the hearing of the appeal even though they did not personally receive the notice of hearing and was only informed orally by the first accused's family members at Kelantan and the second accused having being informed by the first accused, this court was of the view that both the accused ought to be given an opportunity to engage counsel and granted the adjournment and fixed the continuation of the appeal to 18 August 2005.

[17] On 18 August 2005, the accused attended this court and informed the court that they did not engage a counsel as they could not afford one and each of them handed to this court separately a written statement of the mitigating circumstances and were ready to proceed with the appeal.

[18] By the written statement both the accused appealed to this court as follows:

First Accused

Selamat sejahtera Yang Arif Dato',

Saya amat bersyukur dan berterima kasih di atas keputusan yang telah dibuat oleh Yang Arif Majistret Batu Gajah kerana telah memberi peluang kepada saya agar berkelakuan baik dan menjalani kehidupan seperti biasa. Saya betul-betul insaf dan sedar atas kesilapan yang telah saya lakukan.

Yang Arif Dato',

Untuk makluman Yang Arif Dato', semenjak saya didakwa pada tahun 2000 sehinggalah ke hari ini saya tidak pernah lagi disabitkan atau melakukan sebarang kesalahan dan juga dakwaan atas apa-apa kes jenayah. Ini merupakan kesalahan pertama yang pernah saya lakukan.

Yang Arif Dato',

Saya merayu agar Yang Arif Dato' mengekalkan hukuman yang asal. Saya juga telah mematuhi dengan taatnya segala syarat-syarat jaminan yang telah ditetapkan oleh Mahkamah Majistret Batu Gajah.

Yang Arif Dato',

Berilah peluang untuk saya dalam membuka lembaran hidup baru agar menjadi seorang manusia yang berguna. Saya benar-benar insaf dan berjanji tidak mahu lagi terlibat dalam kes-kes jenayah. Tumpuan saya sekarang adalah ingin memberi sepenuh perhatian terhadap keluarga dan kerjaya saya, terutama dalam mendidik anak-anak agar menjadi manusia yang berguna pada agama, bangsa dan negara.

Yang Arif Dato',

Sebagai ketua keluarga, saya mempunyai tanggungjawab yang besar terhadap keluarga iaitu emak, isteri dan 4 orang anak, 2 antaranya telah pun bersekolah, sememangnya mereka amat memerlukan saya dalam menjalani kehidupan harian. Mereka juga merupakan pendorong dan pemberi semangat untuk saya menjadi seorang insan yang baik.

Yang Arif Dato',

Sekiranya saya dihantar ke penjara, ianya akan menyusahkan keluarga serta kehidupan yang akan saya lalui kelak. Saya akan kehilangan segalanya, pekerjaan, keluarga dan penerimaan negatif masyarakat terhadap diri saya. Di sana saya akan berdepan dengan banduan-banduan yang mungkin boleh mendorong saya terjebak balik dengan kegiatan jenayah.

Yang Arif Dato',

Sekali lagi saya merayu dan benar-benar berharap agar Yang Arif Dato' dapat mengekalkan hukuman yang telah dibuat oleh Tuan Majistret Batu Gajah. Saya berjanji dan bersumpah tidak akan mengulangi lagi kesilapan lampau. Jasa baik Yang Arif Dato' amat saya hargai dan tak akan dilupakan sehingga akhir hayat saya.

Terima kasih Yang Arif Dato'.

Dari: Kamaruzaman bin Mahmud
(I/C No: 700623-11-5005)

Tarikh: 18/8/2005

Second Accused

Mohd. Jasmi b. Muhamad,
G1, 92 Lorong Teratai,
Kg. Sri Gombak Indah,
68100 Bt. Caves,
Selangor.

Tarikh: 10hb. Ogos 2005

Yang Arif,
Hakim Mahkamah Tinggi (2),
Ipoh,
Perak Darul Ridzuan.

Yang Arif,

Rayuan Terhadap Kes Di Bawah s. 392 KK

Izinkan saya merujuk perhatian Yang Arif kepada perkara berkaitan sebagaimana di atas iaitu mengenai kes samun di bawah Seksyen 392 Kanun Keseksaan.

2. Terlebih dahulu saya ingin memohon maaf kepada Yang Arif Tuan Hakim yang bijaksana kerana tidak dapat menunaikan permintaan saya sendiri kepada Mahkamah ini iaitu melantik seorang peguam bagi mewakili saya dalam kes rayuan ini. Untuk pengetahuan Yang Arif, saya tidak dapat mengadakan peguam kerana tidak mempunyai wang untuk membayar kosnya. Saya baru beberapa hari mendapat kerja dan gajinya hanya mencukupi untuk menyara diri saya sendiri sahaja. Saya juga tidak mahu menyusahkan keluarga dalam hal ini kerana saya sendiri mengetahui bahawa mereka juga tidak berupaya mengadakan wang yang banyak untuk mengupah peguam.

3. Oleh itu saya menulis surat ini dan ingin membacanya sendiri di hadapan Yang Arif dan ini merupakan rayuan saya kepada Yang Arif.

3.1 Semasa kejadian iaitu pada tahun 2000, saya baru berhijrah ke Kuala Lumpur. Saya mencari pekerjaan untuk menyara diri. Nasib tidak menyebelahi saya. Pekerjaan yang saya dapat tidak tetap dan tidak mampu untuk menampong diri sendiri. Dalam kesusahan tersebut, saya dipertemukan dengan kawan-kawan yang mempunyai latar belakang yang tidak baik. Sebagai budak kampong, saya mudah terpengaruh dengan mereka, tambahan pula pada masa itu saya sentiasa kesempitan wang. Kini saya sedar bahawa pengaruh mereka dan dorongan hidup di Bandaraya Kuala Lumpur telah merosakkan saya.

3.2 Yang Arif, saya telah sedar tentang kesilapan saya di masa lalu. Saya baru mendapat kerja di Seremban. Saya tidak ingin lagi tinggal di Kuala Lumpur dan ingin melupakan terus sejarah lalu. Umur saya pun sudah menjangkau 28 tahun. Kini saya sedar bahawa saya mempunyai tanggungjawab terhadap ibu saya di kampong. Saya merayu kepada Yang Arif agar dapat memberi peluang kepada saya. Saya ingin membina hidup baru. Saya ingin berjasa kepada diri saya sendiri, keluarga saya terutama ibu saya dan bertanggungjawab kepada masyarakat sekeliling saya.

3.3 Saya telah banyak menyusahkan ibu saya, perbuatan saya yang lalu telah menyebabkan beliau sentiasa berada dalam kesedihan dan saya telah membuatkan beliau malu dan aib kepada jiran-jiran sekeliling. Saya ingin menebus dosa-dosa saya terhadap ibu saya. Saya merasa sangat bersalah.

3.4 Saya juga telah sedar bahawa kepentingan awam adalah punca kepada kehidupan yang aman dan damai. Perbuatan saya dahulu telah merosakkan kepentingan awam. Dengan faktor umur yang telah meningkat dan perasaan tanggungjawab yang telah wujud di dalam diri saya, saya ingin berdamping dengan masyarakat. Saya sudah insaf dan telah wujud perasaan benci kepada kejahatan.

4. Dengan ini saya amat merayu kepada Yang Arif Tuan Hakim yang bijaksana agar tidak menambah hukuman yang telah dijatuhkan kepada saya oleh Yang Arif Tuan Majistret dahulu. Pohon Yang Arif dapat memberi peluang kepada saya untuk membina hidup baru yang lebih baik dan biarlah perbuatan saya yang lalu itu menjadi teladan buat saya.

Sekian, terima kasih.

Yang benar

t.t.

...
(Mohd. Jasmi bin Muhamad)
KP: 770830-03-6127

[19] In reply, En. Budiman Lufti bin Mohamed, learned Deputy Public Prosecutor who mentioned the case on behalf of the learned Deputy Public Prosecutor Dato' Abdul Rahman Putra submitted that he would maintain the previous submissions of the learned Deputy Public Prosecutor, Dato' Abdul Rahman Putra which was made on 5 August 2005 and reiterated that the order of binding over under s. 294 of the Criminal Procedure Code should be set aside and instead a custodial sentence should be imposed.

[20] Before this court delivered its decision on the appeal against sentence by the learned Deputy Public Prosecutor, this court discovered that there were several exhibits which were not relevant to the offence which the accused had pleaded guilty and admitted to the facts (exh. P1) were tendered in the lower court and marked as exhibits. There were a total of 27 exhibits which was tendered and recorded in the notes of proceedings and the list was included in the record of appeal. On questioned by this court as to the relevancy of the exhibits and the prejudicial effect on the accused, the learned Deputy Public Prosecutor, En. Budiman Lufti bin Mohamed conceded that some of the items ought not to have been produced in respect of the said offence against the accused as being not relevant and graciously admitted that he could not explain or justify the relevancy of the exhibits to the offence where the accused had pleaded guilty and why it was tendered and accepted by the learned Magistrate.

[21] This court was of the view that many of the items which were tendered in the lower court and marked as exhibits were carried out through a mechanical process by the learned Magistrate and which were admitted by the accused without having been explained to the accused and the relevancy of the same is questionable and ought not to have been tendered and accepted as being irrelevant and prejudicial. Since the learned Deputy Public Prosecutor himself was unable to advance any explanation for this glaring blunder, this court had invited the learned counsel Mr. Kulwinder Singh who had represented the accused at the lower court to attend this court to explain and assist this court as to why he did not raise any objection to the same being admitted as exhibits. This court had also invited both the prosecuting officer and the investigating officer to attend this court and to explain the relevancy of the exhibits to the offence which the accused had pleaded guilty since the learned Deputy Public Prosecutor himself was not able to explain. This court then adjourned the case to 23 August 2005 for the learned counsel, the prosecuting officer and the investigating officer of the case to attend this court and assist this court in determining the relevancy of the items to the offence committed by the accused in order for this court to determine the appropriate sentence.

[22] In the course of reading the notes of proceedings in the record of appeal, this court also discovered another irregularity in the proceedings at the lower court. The officer who recorded the cautioned statement of the first accused was also the prosecuting officer right from the beginning in the instant case at the Magistrate's Court. The prosecuting officer had infact earlier applied to the learned Magistrate to recuse himself as the prosecuting officer as early as 9 February 2001 as he had recorded the cautioned statement of the first accused and had informed the court that another officer will be conducting the prosecution. However, this court found from the notes of proceedings that the said prosecuting officer still continued to attend court as the prosecuting officer on all the eleven (11) subsequent dates fixed for hearing of the case. On 9 December 2004 where both accuseds had pleaded guilty to the charge, the prosecuting officer had also prepared the facts of the case, signed it and tendered it to the court on 10 December 2004 and continued to be the prosecuting officer until the conclusion of the case.

[23] Be that as it may, on 23 August 2005, learned Deputy Public Prosecutors Dato' Abdul Rahman Putra bin Dato' Haji Taha with En. Budiman Lufti bin Mohamed, En. Kulwinder Singh the then counsel for the accused, C/Insp. K. Ganesan, the prosecuting officer and C/Insp. Jamalulai bin Ibrahim, the investigating officer attended this court. As both the learned Deputy Public Prosecutors were not able to enlighten the court on the number of exhibits that were tendered in the lower court, this court invited the prosecuting officer to assist this court to explain the purpose of including all the exhibits which were tendered in the lower court. Thus as expected, the prosecuting officer conceded that all the exhibits except for the parang and the cash which were tendered were not relevant to the offence and that those exhibits were not even mentioned in the facts of the case (exh. P1) and apologized to the court for the error. The investigating officer was also invited by this court to explain the relevancy of the exhibits which were tendered in the lower court and he too conceded that the only exhibits that were relevant to the offence against the accused was the parang and cash recovered from the accused. He informed this court that the rest of the items were recovered from the car from which the accused were arrested and were not related to the said offence and many of the items which were tendered and marked as exhibits by the learned Magistrate were in respect of a charge which was framed against the police store keeper of the exhibits who was eventually charged in court for negligence as all the exhibits which were under his care were found missing. He further informed this court that after the arrest of the accused, he was transferred to Parit and after that he was not aware of what had happened as he had handed the investigation papers to another officer. Therefore he was unable to assist the prosecuting officer at the Magistrate's Court when the accused had pleaded guilty on 9 December 2004.

[24] Learned counsel Mr. Kulwinder Singh apologized to this court for the omission on his part to object to the exhibits which were tendered and found to be not relevant to the offence and that he had overlooked the matter. He also assured this court that he will be more vigilant in future and thanked this court for inviting him to enlighten the court and that he will remember this incident and be more careful in the future.

[25] In reply, learned Deputy Public Prosecutor Dato' Abdul Rahman Putra also apologized to this court for the irregularity committed by the prosecution in the lower court and conceded that those exhibits which were not relevant to the said offence ought to be excluded and assured this court that this will not be repeated and he will advise the prosecuting officers in the state accordingly. It is timely and appropriate to state that it must safely be assumed that the Public Prosecutor stands not necessarily for conviction but for justice as he is not expected to have any personal interest in the case.

Exhibits

[26] Ordinarily, evidence or items recovered from the accused and which are not relevant and has no bearing to the commission of the offence which an accused is charged in court is *prima facie* inadmissible as being irrelevant to the charge and is excluded against the accused. It is one thing to exclude legally admissible evidence if justice so requires, but it is a very different thing to admit legally inadmissible evidence (per Lord Reid in *Myers v. Director of Public Prosecutions* [1965] AC 1001 at p. 1024). In the instance case, the only relevant items admittedly and have bearing to the offence against the accused and included in the facts of the case is the parang, the cash being RM1,340 and a chain whereas the rest of the items tendered and marked as exhibits are inadmissible and is accordingly excluded by this court. This court is of the view that although those items which were not relevant to the said offence may be prejudicial to the accused but it is clear that the learned Magistrate had not taken those exhibits into consideration and is also not reflected in the sentence as both the accused were bound over under s. 294 of the Criminal Procedure Code. Therefore, there was no prejudicial effect against the accused. Nevertheless, as stated above and as conceded by the learned Deputy Public Prosecutor, this court has excluded all those exhibits which were irrelevant to the said offence and the list containing those items is expunged from the record of appeal as inadmissible evidence remained inadmissible and does not become admissible by reason of the failure to object, in the instant case under the irrelevancy and exclusionary rule. (See *R v. Ellis* [1910] 2 KB 746 at p. 764, *Stirland v. DPP* [1944] AC 315 at p. 317, *Jangir Singh v. Rex* [1947] 13 MLJ 159, *Muthusamy v. Public Prosecutor* [1948] 14 MLJ 57 at p. 58, *Rauf bin Haji Ahmad v. Public Prosecutor* [1950] 16 MLJ 190 at p. 191, *Wong Kok Keong v. Regina* [1955] 21 MLJ 13 at p. 16, *Kuruma v. The Queen* [1955]

AC 197 at p. 203-204, *Hamsa Kunju v. Public Prosecutor* [1963] 29 MLJ 228, *Goh Beng Seng v. Dol bin Dolah* [1970] 2 MLJ 95 at p. 97, *Packiam & Anor v. Public Prosecutor* [1972] 1 MLJ 247, *R v. Sang* [1980] AC 402, *Syarikat Jengka Sdn Bhd v. Abdul Rashid bin Harun* [1981] 1 MLJ 201 at p. 203, *Malaysian National Insurance Sdn. Bhd. v. Malaysia Rubber Development Corporation* [1986] 2 CLJ 285; [1986] CLJ (Rep) 185, *Kiew Foo Mui & Ors v. Public Prosecutor* [1996] 1 CLJ 14, *Public Prosecutor v. Tan Kok An* [1996] 2 CLJ 96, *Alcontara a/l Ambross Anthony v. Public Prosecutor* [1996] 1 CLJ 705). This court is unable to find the relevancy or the connection of the other items tendered in court and marked as exhibits in reference to the subject matter of the charge so as to make it admissible in law. (See s. 3 of the Evidence Act 1950). (See *Dr. Jainand v. R* AIR [1949] All 291 at p. 299).

[27] As to the duty of the learned counsel, it is important to be reminded that it is not only the duty of counsel to ensure that he does not mislead the court but he should also be vigilant to ensure that the court is not mislead by opposing counsel and in the instant case, he should have with respect restrained and objected to the said number of items being tendered in the lower court as exhibits as being irrelevant to the offence committed by the accused and as those items were not even referred to in the facts (exh. P1) and admitted by the accused. However, this court has reminded counsel of his duty to the court as much as to his client and that he should at all times be vigilant and take his duty seriously in the professional performance as counsel for his client and in court.

[28] As for the prosecuting officer who was also the recording officer, it is most undesirable that he should conduct the prosecution and continue to attend court as the prosecuting officer although he had applied to recuse himself as the prosecuting officer as early as 9 February 2001 as he had recorded the cautioned statement of the first accused. His explanation to this court for having continued to act as the prosecuting officer was that although he had minuted in the investigating papers to his superiors that he had applied to recuse himself as the prosecuting officer as he had recorded the cautioned statement, there was no replacement and he was directed to continue to be the prosecuting officer. However, this court is of the view that notwithstanding this irregularity and flaw in the conduct of the prosecution in the instant case, it was not fatal or

prejudicial to the accused as first, they had pleaded guilty to the offence and secondly, the prosecuting officer had only prepared the facts of the case when the accused had pleaded guilty and he did not even address the court on the sentence. However, it is hoped that the learned Deputy Public Prosecutor will inform the state police chief or the Officer in Charge of Criminal Investigation that it is most improper and irregular to direct a police officer who is involved and has taken part in the investigation to act as a prosecuting officer in that particular case and that the officer should be replaced or the learned Deputy Public Prosecutor of the State be informed of such matters to avoid any injustice, prejudicial effect or embarrassment and so that another officer could be directed to take over conduct of the prosecution. As to the shody fashion in which the learned Magistrate has recorded the exhibits which were tendered by the prosecuting office, it is most regretful and embarrassing that the learned Magistrate had allowed the proceedings to be conducted in this irresponsible and unjudicial manner. In fact it has been said time and time again, that the court should not wait for objection and to be raised but should interject and disallow inadmissible evidence to be creeped into the trial or proceeding and has to exercise its judicial mind to the given facts case. In *Kiew Foo Mui v. Public Prosecutor* [1996] 1 CLJ 14 at p. 19. His Lordship Edgar Joseph Jr. FCJ said:

> In our view, the learned judge remained under such a duty since it is not just of some importance, but of fundamental importance to the administration of criminal justice, that an accused person should feel that he has not been deprived of that priceless asset – namely a fair trial, notwithstanding the shortcomings of his counsel. It is axiomatic that the primary duty of a judge at any trial – whether criminal or civil – is to ensure that justice is done, no doubt, according to law.

A Magistrate or Sessions Court Judge should not just act as a mere recording machine be it in an adversary system as practiced in this jurisdiction but must at all time be vigilant and prevent prejudicial irrelevant or inadmissible evidence from being introduced or creeped into at a trial or in any proceedings which includes at the stage of recording a plea of guilty by an accused. A judicial officer has to exercise his or her discretion judiciously and not mechanically as the proper exercise of the discretion in the administration of justice is of considerable importance. In fact, even a counsel's admission of a point of law cannot be binding upon a court; and court is not precluded from deciding the rights

of the parties on a true view of the law (See *Societe Belge de Banque S.A. v. Roa Girdhari Lal Chaudhary* AIR [1940] Privy Council 90). In the instant case, there are several glaring errors in the taking of plea by the learned Magistrate and it was done in a stock form and mechanical fashion.

[29] This court finds that the whole proceedings in the Magistrate's Court appears to have been carried out:

(1) by the learned Magistrate in a mechanical fashion and without any judicial mind;

(2) by the learned counsel who owed a duty to his clients appears to have performed his legal duty in a mechanical fashion;

(3) by the prosecuting officer who had recorded the cautioned statement of the first accused and who obviously was not trained in law had with respect misled the court by producing to the court items which ought not to have been tendered and marked as exhibits.

[30] This court cannot condone such mechanical exercise in the administration of justice. Counsel for the accused must be prepared to accept his share of responsibility for the flaws and not just blame the court and the prosecution because as a lawyer who is retained by the accused, he is expected not only to protect his client's interest but he must also be able to assist the court and to ensure that justice is done according to settled judicial principles. Counsel must not only not mislead the court but surely he or she must be vigilant to ensure that the court is not misled by his or her opposing counsel. The court can dispense with justice only if counsel will not mislead, otherwise justice will suffer from infirmity of the court itself being devoid of justice. People seldom pause to ask sometimes what safety the ordinary individual has in the hands of lawyers if the court itself, in which he seeks redress is no longer safe to be in the same hands (per Abdul Razak J in *Tara Rajaratnam v. Datuk Jagindar Singh & Ors* [1983] 1 CLJ 257; [1983] CLJ (Rep) 892). An accused person cannot be penalised for the fault of his lawyer and his case is to be judged on its own merits. (See *Mahant Hakumat Rai v. Emperor* AIR [1943] Lah 14 at p.17)

[31] As for the items which were tendered as exhibits and which were found to be irrelevant to the charge, the police authority must be prepared to seek advise from the state Deputy Public Prosecutor in matters relating to admissibility of evidence and the conflict of interest faced by the police officer conducting the prosecution in the lower courts. In the instant case, it is inexcusable for the police authority not to have referred the dilemma faced by the prosecuting officer and sought the assistance of the Deputy Public Prosecutor which would include seeking the views on the items which were not relevant to the charge and the mix up of the said exhibits which were tendered against the accused and contrary to the facts of the case presented by the prosecution. It is hoped that this sort of unbecoming and unprofessional conduct will not be allowed to happen in future so that there will not be a mockery in the administration of justice and in this institution which is supposedly a sacred institution with utmost integrity. The learned Magistrate himself has to accept the blame and take responsibility for the flaws as first, he was in charge of the proceedings and ought to have been vigilant himself and secondly, he was performing judicial function and ought to act judiciously and not carry out his duties in a mechanical fashion and merely to meet the requirements of statistics.

[32] Accordingly, all the items which were marked as exhibits except for the 'parang' and the cash being RM1,340 which is reflected in the facts of the case are excluded and expunged from the record of appeal as being irrelevant and inadmissible. In *Shaw v. Director of Public Prosecutions* [1961] 2 All ER 446, Viscount Simmonds said at p. 452

> In the sphere of criminal law, I entertain no doubt that there remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the state, and that it is their duty to guard it against attacks which may be the more insiduous because they are **novel and unprepared for ...** there is in the [High] Court **a residual power, where no statute has yet intervened to supersede the common law,** to superintend those offences which are prejudicial to the public welfare. (emphasis added)

[33] As for the delay in the proceedings which took four years to conclude, it is a combination of several factors, first, the application by the defence counsel for adjournments on five occasions on the dates fixed for hearing and on one occasion, the

Magistrate had granted the application for adjournment without any formal application but over the telephone on the ground that the defence counsel had not received the charge and was engaged in another court in Ipoh and without any details of that case, secondly, there was no prosecuting officer to conduct the prosecution on three occasions fixed for hearing and thirdly, the Magistrate was away to attend course on two occasions. Although granting or refusing an application for an adjournment is a matter of the discretion of the court but the ground advanced for the adjournment must clearly demonstrate that it is necessary for the purpose of justice. However, if the grounds advanced clearly abuses the process of court which results in delayed justice or is inspired by improper motive then in those circumstances, the lower court must be firm and strict and possibly refrain from granting the adjournment or impose terms as may be necessary in the granting of the adjournment. Section 259 of the Criminal Procedure Code states:

Power to postpone or adjourn proceedings.

(1) If, from the absence of a witness or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of or adjourn any inquiry or trial the Court may, by order in writing, from time to time, postpone or adjourn the same on such terms as it thinks fir for such time as it considers reasonable and may, by warrant, remand the accused if in custody:

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding eight days at a time:

Provided further that where a Government Medical Officer has certified that the complainant will not be able to give evidence before a certain date the accused may be remanded until such date notwithstanding that the term of remand may exceed eight days.

(2) Every order made under this section by the Court of a Magistrate shall be in writing, signed by the presiding Magistrate, and shall state the reasons for it.

[34] (See *Public Prosecutor v. Low Yong Ping* [1961] 27 MLJ 306 at p. 307, *Mohamed Ekram v. Public Prosecutor* [1962] 28 MLJ 129, *Lee Fook Sam v. Public Prosecutor* [1963] 29 MLJ 371, *Tan Foo Su v. Public Prosecutor* [1967] 2 MLJ 19, *Public Prosecutor v. Tanggaah* [1972] 1 MLJ 207, *Public Prosecutor v. Hettiarachigae L.S.*

Pereira [1977] 1 MLJ 12, *Public Prosecutor v. Mohtar bin Abdul Latif* [1980] 2 MLJ 51, *Public Prosecutor v. Tan Kim San* [1980] 2 MLJ 98, *Public Prosecutor v. Karumah* [1980] 2 MLJ 102, *Go Pak Hoong Tractor And Building Construction v. Syarikat Pasir Perdana* [1982] 1 MLJ 17, *Lee Ah Tee v. Ong Tiow Pheng & 7 Ors* [1984] 1 CLJ 26; [1984] 1 CLJ (Rep) 187, *Tan Pak v. Cham Boon San And Other Actions* [1992] 2 MLJ 271, *Awaluddin bin Suratman & Ors v. Pendakwa Raya* [1991] 3 CLJ 2459; [1991] 2 CLJ (Rep) 310, *Kahar Ak Tongah v. Public Prosecutor* [1992] 4 CLJ 1865; [1992] 4 CLJ (Rep) 618, *Por Choo Air lwn. Pendakwa Raya* [1993] 2 MLJ 131 and *Sharma Kumari a/p Oam Prakash v. Public Prosecutor* [2000] 6 MLJ 282).

[35] Criminal justice is striving for early disposal of trials fixed for hearing and adjournments must not be used as an affront of justice. Counsel who are retained to represent an accused should assist the court by being prepared to proceed with the trial on the date fixed for hearing on a day to day basis until its conclusion unless the adjournment was necessary for the purpose of justice or there was reasonable cause. (See *Public Prosecutor v. Tanggaah* [1972] 1 MLJ 207). In any event, the postponement of this criminal case for nearly four (4) years before its conclusion at the lower court before three different Magistrates, first, at the request of the lawyer on five occasions, secondly, at the request of the prosecution on three occasions and thirdly, at the instance of the court on two occasions is certainly an unacceptable delay and an abuse of the process of the court on the facts and circumstances in the instant case. It cannot be said that the granting of adjournment in the instant case has been exercised judiciously even though the court must not fetter the discretion given to the learned Magistrate by rigid rules for which a judicial officer must exercise his discretion judiciously. (See *Ward v. James* [1966] 1 QB 273 at p. 295). Inexcusable delays of this nature can do nothing but bring the due and proper administration of justice into contempt and disrepute. (See *Teoh Siew Lean (f) & Anor v. Public Prosecutor* [1958] 24 MLJ 145 at p. 148).

Punishment

[36] As to the sentence, prevalence is a relevant consideration when deciding an appropriate level of sentence *R v. Henry* [1999] 46 NSWLR 346; 106 A Crim. R 149 (12 May 1999) per Spigelman CJ at [86]. Prevalence may refer to:

a situation in which a particular crime occurs with such frequency that it has a salience beyond those immediately affected by the crime, which impacts on society by changing patterns of behaviour due to increased apprehension; or

the incidence of a particular crime increasing over a period of time leading to an increase in the weighting of general deterrence. (See *R v. Henry* [1999] 46 NSWLR 346: 106 A Crim. R 149 per Spigelman CJ at [87]-[88]).

[37] The prevalence of an offence is a relevant factor that may be taken into account by the sentencing judge so that the sentence will reflect both the seriousness of the offence and its prevalence: *R v. Cuthbert* [1967] 86 WN (Pt 1) NSW 272 per Herron CJ at 278; *Broxham* (unreported, NSW CCA, 3 April 1986). The prevalence of an offence such as drug trafficking in a particular location is a relevant matter on the question of general deterrence: *Coleman* [1991] 56 A Crim. R 369 per Carruthers J at 373.

[38] The basic object of sentencing offenders have been said time and time again under the following general categories:

(1) deterrence, which is to deter the particular offender and potential offenders (See *R v. Kenneth John Ball* 35 Cr. App. R. 164 and *Ahmad bin Haji Bakar v. Public Prosecutor* [1998] 2 MLJ 216 at 217). In some cases, deterrence sentence have been passed where the crime is of a particular gravity or the particular type of offence is prevalent and difficult to detect (See *Re Eng Chong Lam* [1964] 30 MLJ 10 at 11, *Public Prosecutor v. Teh Ah Cheng* [1976] 2 MLJ 186 and *Low Thim Fatt v. Public Prosecutor* [1989] 1 MLJ 304).

Prevention

(2) In some cases, neither deterrence nor rehabilitation changes the offenders way of life. So in this category of cases, the only protection which the public expect is imprisonment to be imposed against the offender (See *Reg v. Sargeant* [1974] 60 Cr. App. R. 74).

Retribution

(3) In this situation, the sentence imposed must reflect societies abhorrence of particular type of crime and this is reflected by the sentences imposed by the court. (see *Reg v. Sargeant*

A [1974] 60 Cr. App. R. 74, *Reg v. Davies* [1978] 67 Cr. App. R. 207 and *Public Prosecutor v. Muhari bin Mohd Jani* [1999] 8 CLJ 430).

Rehabilitation

B (4) The object of this sentence is basically to rehabilitate the offender and this is achieved by imposing punishment other than imprisonment. (See Criminal Procedure Code which provides for some form of bonds).

C **Armed Robbery**

[39] This court is of the view that if a crime, like armed robbery has been committed which is one 'calculated to inspire great alarm', as manifesting a very mischievous disposition, or especially D rife in a particular district or throughout the country, it may be necessary to award a very severe punishment and to take away from the offender the power of committing such a crime or any crime for a long period. (See *Choh Wai Sung v. Public Prosecutor* [1946] 12 MLJ 119 at p. 123).

E **[40]** There is a pressing need to protect the public from serious harm such as offences of robbery and violence and one of the ways to give the necessary protection is to keep the offenders away from society and if the facts so warrant for a longer period. F While the need to impose a non custodial sentence against first offender and those who plead guilty is to be taken into consideration, so was the need to ensure that public safety, their property and belongings are also well protected. Clearly, the offence of robbery with a deadly weapon, being parang, is one G calculated to inspire great alarm and is especially rife in most robbery offences. In the instant case, the admission by both the accused that the parang was carried in the course of the commission of robbery as a protection to personal safety cannot be considered on the facts as a true mitigating circumstances as H only if the victims had resisted, protested, challenged or raised an alarm the parang would have been inevitably used upon the victims and consequently the result would have been a great disaster. Society is terrified by robbers and especially those who are armed. Robbery, and particularly armed robbery, is an offence I against the person, as well as an offence against property. (See *Reg v. Sargeant* [1974] 60 Cr. App. R. 74, *Public Prosecutor v. Teh Ah Cheng* [1976] 2 MLJ 186, *Public Prosecutor v. Loo Choon Fatt* [1976] 2 MLJ 256 at p. 257-258, *Reg v. Davies* [1978] 67 Cr.

App. R. 207, *Public Prosecutor v. Leo Say & 2 Ors* [1985] 2 CLJ 155; [1985] CLJ (Rep) 683, *Low Thim Fatt v. Public Prosecutor* [1989] 1 MLJ 304, *Public Prosecutor v. Chot Saik Kam* [1991] 1 MLJ 193, *Public Prosecutor v. Muhari bin Mohd Jani & Anor* [1999] 8 CLJ 430, *Zaidon Shariff v. Public Prosecutor* [1996] 4 CLJ 441, *Public Prosecutor v. Govindnan a/l Chinden Nair* [1998] 2 CLJ 370, *Tan Lay Chen v. Public Prosecutor* [2000] 4 CLJ 492).

[41] The Court of Criminal Appeal has said in many cases that the range of sentences imposed for serious armed robbery offences should be much higher than those in fact imposed by sentencing judges. Observations were passed by the court as long ago as 1984 in *R v. Hayes* [1984] 1 NSWLR 740 at 743; [1984] 11 A Crim. R 187, repeated in *Ellis* [1993] 68 A Crim. R 449 where Hunt CJ at CL observed that reference to the judgments in *Flack And Smith* (unreported, NSW CCA, 12 December 1989) demonstrated that a higher range of sentence for armed robbery was required, and gave a clear indication that sentences should be increased for that crime. In *Vu (Manh Hung)* (unreported, NSW CCA, 11 November 1993), the court stated that "the time has more than come for far more deterrent sentences to be imposed for those offences of serious armed robbery".

[42] In *R v. Spiero* [1979] 22 SASR 543, King CJ said at 549:

> It must be made clear beyond misunderstanding that when a person engages in robbery, while armed with a weapon, he can expect, when apprehended and convicted, a long sentence of imprisonment. Armed robbery is a crime which leaves little scope for leniency even when mitigating factors are present. In this case mitigating factors are few. The appellant has a criminal record. He is addicted to heroin. One feels sympathy for a person who has become entangled in drug addiction, but the courts cannot treat addiction as an excuse, or even a mitigating factor, in relation to serious crime. Those who are addicted to drugs must understand that if they allow their addiction to lead them into serious crime, they must expect to receive the same severe punishment as would be received by others.

[43] The community is tired of armed robberies conducted by criminals to fund their drug habits. Apart from the high cost of protection against such robberies, the violence involved instils fear in the staff and customers of banks and other business that deal with cash. The community expects heavy sentences, rather than

undue leniency because of "unhappy upbringing" or promises of reform: *Petrinovic (Frank)* (unreported, NSW CCA, 18 September 1990) per Hunt J.

Objective Gravity

[44] Armed robbery is perceived as a life threatening situation for a majority of victims who may experience significant physiological and psychological problems. It is for this reason that armed robbery is regarded as a serious offence. In fact, it is a matter of common sense and common knowledge that armed robbery is not merely a crime against property, it is a crime against persons: see the armed robbery guideline case of *R v. Henry* [1999] 46 NSWLR 346; 106 A Crim. R 149 per Spigelman CJ at [96]-[99].

[45] Objective factors frequently taken into account are:

– the nature and degree of violence;

– the degree of premeditation;

– whether committed in company;

– whether the offender(s) wore disguises;

– the atmosphere generated by the conduct of the offender(s);

– the prevalence of the offence;

– the value of property involved; and

– the offender's position of trust.

See, for example: *Mangan (Kenneth)* [1999] NSWCCA 194 (21 July 1999) at [14]-[15] for a case where it was considered an aggravating factor that an armed robbery had been committed in the early hours of the morning on a vulnerable victim (in this case a convenience store attendant). Similarly, in *Doorey (Peter James Christian)* [2000] NSWCCA 456 at [24], a robbery at a service station was considered to be of greater objective seriousness as it was carried out under cover of darkness and out of busy trading hours. See also: *Webster (Patrick John)* [1999] NSWCCA 313 (27 September 1999) at [5].

[46] Robbery, whether with or without arms, is regarded in virtually all circumstances as an offence of the utmost gravity: (See *Valentini* [1989] 46 A Crim R 23). The type of weapon used does not make a great deal of difference to the objective culpability of the offender. An armed assault, with whatever weapon, is a grievous breach of the criminal law: *George (Scott Tony) And Johnson (Brett)* [1999] NSWCCA 243 (30 June 1999) at [19]. In the light of the appalling increase in crimes involving violence which disrupt law, peace and order which has resulted in death particularly repeat offenders – must be prepared to lose their liberty and accept custodial sentences imposed by the courts. Sentence imposed must be in accordance to law and this must necessarily mean in accordance with established judicial principles. (See (1) *Public Prosecutor v. Jafa bin Daud* [1981] 1 MLJ 315, (2) *Zaidon Shariff v. Public Prosecutor* [1996] 4 CLJ 441, (3) *Pendakwa Raya lwn. Ooi Kwang Lai* [2000] 6 MLJ 622 and (4) *Public Prosecutor v. Taib bin Ali* [2001] 6 MLJ 628).

[47] In the instant case, the learned Magistrate has taken into consideration extraneous matters which were not before the court when assessing the appropriate sentence to be passed and this is an unauthorized exercise of discretion. (See *Bhandulananda Jayatilake v. Public Prosecutor* [1982] 1 MLJ 83 at p. 84). The learned Magistrate had further misinterpreted and misapplied the provision of s. 294 of the Criminal Procedure Code in favour of both the accused without any regard to the gravity and rampancy of the offence and public interest and this court cannot confirm such a decision. Robbery is a matter of public concern and should be met with a custodial sentence.

[48] This is a clear case of the learned Magistrate leaning towards the accused, being over sympathetic and swaying towards the family and expressing personal sentiments and feelings and in total disregard to the established judicial principles. Magistrate ought not to be over sympathetic towards accused who commit serious and grave offences and instead should keep personal sentiments and feelings aside when exercising judicial discretion. The fact that the accused are first offender and had pleaded guilty to the offence are itself not sufficient ground to invoke the provision of s. 294 of the Criminal Procedure Code. The court must also consider and grant sufficient weight to the gravity of the offence, in the instant case, robbery with deadly weapon, the public interest and the rampancy and the circumstances under which the offence was committed. In the instant case, the nature of the offence is not

trivial and there are no extenuating circumstances under which the offence was committed or the health or mental state of the accused is affected in order to escape custodial sentence. Prevalence of similar offence is a relevant consideration that the court may take into account in determining the appropriate sentence (see *Ooi Joo Keong v. Public Prosecutor* [1997] 2 SLR 68). Where the offence is prevalent, a more serious severe sentence may be meted out to mark the court's disapproval and to acknowledge the seriousness of the offence. (See *Public Prosecutor v. Tan Fook Sum* [1999] 2 SLR 523 and *Purwanti Parji v. Public Prosecutor* [2005] 2 SLR 220 at p. 229).

[49] The accused had informed this court that they committed robbery because they had lost money in the amusement centre and needed money. They also informed this court, that the deadly weapon, namely parang was carried by them at the time of the commission of the offence of robbery for protection and for their own safety. Surely, those two grounds advanced by the accused for having committed robbery armed with a parang cannot by any stretch of judicial mind be extended or come within the ambit of extenuating circumstances under which the offence was committed. The learned Magistrate had also failed to consider the wider concerns of society and the fact that the accused did not plead guilty at the first available opportunity they were charged in court on 19 October 2001 but pleaded not guilty and instead allowed the case to be dragged on for over a period of four years until they changed their plea to guilty only on 9 December 2004.

[50] In *Ong Lai Kim v. Public Prosecutor And Other Appeals* [1991] 2 CLJ 1568; [1991] 3 CLJ (Rep) 376, His Lordship Zakaria Yatim J (as he then was) said:

> The punishment must not only deter the appellants from committing a similar offence in the future but it must also deter others from committing such an offence. The punishment inflicted for grave offences including the crime of rape should adequately reflect the revulsion felt by the great majority of society. See *JC Smith & B Hogan Criminal Law* (5th Ed) at p 6.
>
> In this case therefore the punishment has to be sufficiently harsh and proportionate to the harm done, otherwise society will feel that the punishment is manifestly inadequate. The punishment must also reflect public disapproval of the crime committed by the appellants. See *R v. Roberts* at p 610.

Similarly, the punishment for the robbery offence must also be deterrent in nature. The appellants are no doubt first offenders but as they have been convicted of a serious crime involving violence, the primary consideration of the court is the element of public interest and society's abhorrence of this type of crime. See *Goh Chung Wee v. PP*.

[51] In *Public Prosecutor v. Loo Choon Fatt* [1976] 2 MLJ 256 at p. 257, His Lordship Hashim Yeop A. Sani J (as he then was) said:

... In my view the courts will not be performing their functions honestly if the seriousness of the situation is not reflected in the sentence imposed or if the sentence appears to defeat the object of the statute. This is not saying that the courts in the treatment of ... offences should at all times be severe. Each case has to be determined on its own merits. But in every case the courts must be realistic and rational.

In view of the failure on the part of the President to consider, in his grounds of judgment, the question of public interest and the amount of heroin found with the respondent, in my opinion the President has erred in exercising his discretion when he sentenced the respondent. His decision on sentence in this case is manifestly wrong. It is therefore, an appropriate case for this Court to interfere with the discretion of the President.

[52] In *Public Prosecutor v. Vun Tain Yin & Anor.* [1986] 1 CLJ 94; [1986] CLJ (Rep) 633, His Lordship Abu Mansor Ali J (as he then was) said:

It has been said many times one of the principles in assessing sentence is the degree of deliberation shown by the perpetrators of the offence. The respondents' acts were deliberate and motivated by greed for monetary gain without second thoughts what they unleash or let loose into the market. It has also been many times said in sentencing the interest of the prisoner is not the only consideration. It must be projected against the higher consideration of public interest and considerations of such matters that they were breadwinners of the family and the like are no mitigating factors.

After having considered all aspects of this offence by the respondents it is felt that it is the duty of this Court to remind the public, so that it may act as an effective deterrent and also speak of the clear stand of the Court when an offence of this nature is committed that the punishment can only be imprisonment.

[53] In *Public Prosecutor v. Lee Tak Keong* [1989] 1 MLJ 307, His Lordship Zakaria Yatim J (as he then was) said:

> The offence of robbery is rampant today and in most cases dangerous weapons are used. In some cases the victims of the robberies sustain injuries: see *Goh Chong Wee v. PP* and *PP v. Mustanina bin Daing Sinring & Anor*. In cases of robbery the court must take into consideration the element of public interest. This means that the court must impose a deterrent sentence not only to deter the respondent from committing the same offence again but to deter others from committing the same type of crime. The court is aware that in the present case no dangerous weapons were used and the complainant and his friend were not injured. But the court must not overlook the fact that there were five of them who surrounded the complainant and his friend and committed the robbery. If the court does not impose a deterrent sentence the respondent and his four other friends may commit similar offences and they may even use dangerous weapons and inflict injuries on their victims.
>
> I must add that in imposing sentence in this case, the court must also consider society's abhorrence of this type of crime.
>
> The sentence passed by the learned president was manifestly inadequate. The learned president failed to take into consideration the element of public interest. I have taken into consideration that the respondent was a first offender and that he was only twenty years old when he committed the offence. I have also taken into consideration the submission made by his counsel.

[54] In *Public Prosecutor v. Leonard Glenn Francis* [1989] 1 CLJ 972; [1989] 2 CLJ (Rep) 320, His Lordship Edgar Joseph Jr. J (as he then was) said:

> (2) the first and foremost consideration of punishment is the public interest. The object of punishing crime is not only to punish the offender but also to deter others. Public interest is best served if the offender is induced to turn from criminal ways to honest living. The law does not, therefore, fix the sentence for a particular crime but fixes a maximum sentence and leaves it to the court to decide what is the appropriate sentence in the particular circumstances of each case. It is for these reasons that evidence of antecedents and character should be taken before sentence in respect of each convicted person.

The fact that the accused may be a youth, a first offender and has pleaded guilty, whilst relevant in considering the sentence to be imposed, must perforce yield to the public interest in ensuring deterrence and prevention.

Accordingly, the appeal against sentence as regards the first charge is allowed. The order binding over the respondent under s. 294 of the Criminal Procedure Code is quashed. Similarly, the appeal against sentence as regards the second charge is also allowed. The order imposing a fine (which if paid must be refunded) is quashed.

In all the circumstances, after having given anxious consideration to the age, character, antecedents and family background of the respondent and the circumstances of the case as a whole, in respect of the first charge, I substitute a sentence of 18 months' imprisonment with effect from today and impose the mandatory order of whipping with six strokes. In respect of the second charge, I substitute a sentence of 18 months' imprisonment. The sentences to run concurrently as the offences were, in my view, committed in the course of a single transaction.

[55] In *Joginder Singh v. Public Prosecutor* [1984] 2 MLJ 133 at p. 140, His Lordship Ajaib Singh J (as he then was) said:

On the question of sentence the courts invariably take certain factors into consideration the first and foremost being the public interest. Then the age of the offender, his health, his character and background, the nature of the offence and the circumstances and the manner in which the offence is committed. The courts are duty-bound to consider all these matters before deciding upon a suitable sentence. On an appeal on sentence from the subordinate courts therefore the High Court will not interfere with the sentence imposed unless it can be shown to its satisfaction that in the circumstances of the particular case the sentence was manifestly excessive or inadequate or that in fixing the sentence the subordinate court had failed to adequately consider all relevant factors either for or against the offender.

The appellant is a first offender and by pleading guilty he has no doubt shown some measure of remorse on his part. But on the other hand the offence which he has committed is of such a grave nature that it outweighs the mitigating factors which have been advanced in his favour.

There are no merits in this appeal and no extenuating circumstances whatsoever which can be taken in favour of the appellant.

[56] In *Public Prosecutor v. Rajandran & Anor.* [1985] 2 MLJ 260 at p. 262, His Lordship Chan J (as he then was) said:

> ... As a general rule it is undesirable that a first sentence of immediate imprisonment should be very long, disproportionate to the gravity of the offence and imposed ... for reasons of general deterrence, that is as a warning to others. The length of a first sentence is more reasonably determined by considerations of individual deterrence" said MacKenna J in *Reg v. Curran*. It is right that they should receive substantial sentences for this class of crime but a sentencing court must be careful not to pass a sentence which is disproportionate to the gravity of the offence. It is undesirable that a first sentence of immediate imprisonment should be imposed for reasons of general, as opposed to individual, deterrence. But it might be said that a thief who is minded to break into other people's homes to steal their goods is not likely to be deterred by the fact that he may get three years rather than two years or six years rather than three years. The hearing of prison gates closing behind him is an experience which he does not want again. That is right, but what has got to be maintained is this; if persistent burglars are caught they will be punished and punished very severely. Therefore it must be made clear that anyone found deliberately breaking and entering homes for the purpose of stealing substantial quantities of goods for disposal must expect a severe sentence.

[57] In *Reg v. Davies* [1978] 67 Cr. App. R. 207, 210, Lawton LJ said:

> What then is the right sentencing policy in this class of case? ... There are of course the classical considerations relevant to all sentences: retribution, deterrence, prevention and rehabilitation ... At one time it was fashionable to suggest that retribution ought not to enter into sentencing policy. That opinion. I think, is not held as strongly now as it was a few years ago. The reason is manifest; the courts have to make it clear that crime does not pay and the only way they can do is by the length of sentences. Sentences show the court's disapproval, on behalf of the community, of particular types of criminal conduct.

[58] In *Tan Chew Man v. Public Prosecutor* [1977] 2 MLJ 247 at p. 248, His Lordship Ong Hock Sim FJ said:

> The point at issues however whether section 397 constitutes a separate offence in itself. We respectfully submit that it does not and that in fact section 397 only provides for an additional punishment for the person or persons who at the time of

committing or attempting to commit robbery are armed with or use deadly weapons or cause grievous hurt or attempts to cause death or grievous hurt and concluded:

(Our section 397 replaced the former sections in *pari materia* which provided for minimum terms to be imposed and prescribed that the punishment for robbery (under section 392) and attempted robbery (under section 393) for an offender armed with a deadly weapon shall be liability to whipping "in addition to any other punishment under any other section of the Code.").

As *Ratanlal in The Law of Crimes* (22nd Edition) at page 1024 says:

This section is merely a rider to section 394. It does not create any substantive offence.

[59] In *Public Prosecutor v. Muhari Bin Mohd Jani & Anor* [1999] 8 CLJ 430 at pp. 448-449, His Lordship KC Vohrah J (as he then was) said:

Clearly the courts are under a duty, and in the larger interest of substantial justice, to show their abhorrence of this type of crime. While the judge of the sessions court did not state that she took into account public interest, that, unfortunately, was not sufficiently reflected in the sentences which she passed on the two respondents.

The principle of holding in abeyance maximum sentence for the most serious likely instance of the offence should mean that an offender who pleads guilty does not receive the maximum sentence. His plea of guilt provides him with mitigation, so the sentencing court must leave room for the passing of a more severe sentence in a case where the offence is just as grave and the offender pleads not guilty.

Chan J (as he then was) sentenced each of the accused to the maximum of 20 years' imprisonment and refused to give them credit for their plea of guilt, stating at p 158:

As I have said earlier, all three pleaded guilty. Although they are entitled to some credit for that, it must be set off against the enormity and seriousness of the crime they committed …

[60] In *Lee Wai Kam v. Public Prosecutor* [1976] 2 MLJ 19. His Lordship Abdoolcader J (as he then was) said:

A Robbery is an abhorrent and violent crime particularly when weapons are used in its commission although not used physically in the sense of inflicting actual bodily harm; but the terror is still there and a stop must be put to this through deterrence. The question of public interest is as important and vital as other
B considerations including antecedents, age and background of an accused person. The appellant as I have pointed out is some 6 to 8 months older than the other person. It may well be in the circumstances that he deserved a somewhat higher form of punishment than the other person. The argument that just because there is that amount of a few months' difference between their
C ages would necessarily entitle him to the same form of punishment is not in my view valid as otherwise any extension of the already thin dividing line in the spectrum of the ages of the youthful offenders would result in ignoring other material considerations and result in a reductio ad absurdum.

D **[61]** In *Lee Yew Siong v. Public Prosecutor* [1973] 1 MLJ 37 at p. 38, His Lordship Abdul Hamid J (as he then was) said:

... The first and foremost consideration of punishment is the public interest. The object of punishing crime is not only to
E punish the offender but also to deter others. Public interest is best served if the offender is induced to turn from criminal ways to honest living. Our law does not therefore fix the sentence for a particular crime but fixes a maximum sentence and leaves it to the court to decide what is the appropriate sentence in the particular circumstances of each case. It is for these reasons that
F evidence of antecedents and character should be taken before sentence in respect of each convicted person. *(Abu Bakar v. R. (supra))*.

[62] In *Public Prosecutor v. Tengku Mahmood Iskandar & Anor* [1973] 1 MLJ 128 at p. 129, Raja Azlan Shah J (as His Royal
G Highness then was) said:

It is well settled that the sentence must reflect the gravity of the offence. In the present case it is not so much the triviality of the injury but the circumstances culminating in the commission of the
H offence which are of importance.

[63] In *Tan Thye Seng & Anor v. Public Prosecutor, Public Prosecutor v. Tan Hean Seng* [1967] 2 MLJ 173 at p. 174, His Lordship Ong Hock Sim J (as he then was) said:

I

This is an appeal by the first two appellants against the sentence of 3 years' imprisonment and twelve strokes of the rattan upon their conviction on their pleas of guilty by the learned president, sessions court Penang on an amended charge:

There is also an appeal by the learned deputy public prosecutor in respect of another accused who had been jointly charged with the two appellants and had also been convicted on the same charge on his own plea of guilty, but who was released on bond for one year in the sum of $1,000 and to be under the supervision of the probation officer under section 290 of the Criminal Procedure Code (S.S. Cap 21) for the like period.

... In the light of the fact that the learned president himself in his grounds of judgment stated that there have been far too many robberies in town these days and I should refrain from interfering with the discretionary powers exercised by him as to the punishment. Accordingly I confirm the sentence of 3 years' imprisonment on the two appellants.

In respect of the other accused I set aside the order of binding over under section 294 of the Criminal Procedure Code and substitute a sentence of 12 months' imprisonment from date of this order.

[64] In *Koay Teng Soon & Anor v. Public Prosecutor* [2000] 1 CLJ 677 at pp. 679-680, His Lordship Haidar JCA (as he then was) said:

"Having considered the mitigating factors put forward by the appellants' counsel and to what the learned deputy public prosecutor submitted, the appropriate sentence in our view, should be a custodial sentence." "... we must in considering the sentence to be imposed take into account the public interest element and not merely the interests of the appellants even though they might be of young age at the time of the commission of the offence."

In *Tan Bok Yeng v. PP* [1972] 1 MLJ 214 in dealing with the sentence in respect of an offence of robbery involving one of the accused whose age was 20 years, His Lordship Sharma J said at p 215B-E:

The second accused was 20 years of age while the appellant was 25 years at the date of the commission of the crime. I am quite aware that the law does provide for a lesser sentence or no sentence at all imposed upon persons of young age. *There has, however, emerged in recent years in our society certain species of crimes which the alacrity of mind and body, the dare, dash and defiance of the*

youth alone is capable of performing and producing. Law cannot, in my view, remain merely a static and a meaninglessly passive, if ornamental and an orthodox instrument of justice, ineffective in its results and application. The social needs of the times have to be met and effectively met. It is not merely the correction of the offender which is the prime object of the punishment. The considerations of public interest have also to be borne in mind. In certain types of offences a sentence has got to be deterrent so that others who are like-minded may be restrained from becoming a menace to society. (emphasis added)

In *PP v. Loo Choon Fatt* [1976] 2 MLJ 256 His Lordship Hashim Yeop Sani J (as he then was) at p 258A-C said:

... A convicted person will also normally bring up problems of family hardship and the other usual problems of living. In such a situation the courts might perhaps find it difficult to decide as to what sentence should be imposed so that the convicted person may not be further burdened with additional hardship. This is my view is a wrong approach. The correct approach is to strike a balance, as far as possible, between the interests of the public and the interests of the accused. Lord Goddard LCJ in *Rex v. Grondkowski* [1946] 1 All ER 560, at p 561, offered some good advice when he said:

> The judge must consider the interests of justice as well as the interests of the prisoners. It is too often nowadays thought, or seems to be thought, that the interests of justice means only the interest of the prisoners.

In our view, the public interest far outweighed the mitigating factors put forward for the appellants given the facts and the serious injuries inflicted that resulted in the death of Liew Chin Lin and the appropriate sentence would be nine years imprisonment on each of the appellants but the sentence to take effect from the date of arrest, that is, 16 February 1995 and we so ordered.

[65] In *Abdul Karim v. Regina; Sundra Singh v. Regina; Loh Kai Hoi V. Regina* [1954] 20 MLJ 86, Brown, Ag. CJ said:

In the matter of punishment, the "type of offence" is the concern of the Legislature, which has provided the maximum punishment which can be inflicted for a serious offence of that type. The particular offence, and the particular offender, are the concern of the Court, whose business it is to decide what punishment is merited upon the facts of the individual case within the limits which the Legislature has provided. Any tendency to standardise punishment for any type of offence is to be deplored because it

means that the individual offender is being punished not upon the facts of his particular case but because he has committed an offence of that type. This tendency is particularly to be resisted in imposing punishment for an offence for which the Legislature has not left a wide field of discretion to the Court. For the offence which I am considering (unlike the offences, for example, of robbery or rape) the Legislature has limited the Court's discretion to a fine of $500 or 4 months' imprisonment for a first offence.

[66] In *Yong Pak Yong v. Public Prosecutor* [1959] 25 MLJ 176 at p. 177, Good J said:

In dealing with a matter of sentence as distinct from considering whether a person ought to be convicted or not of the offence, I think that the Courts are entitled to take judicial notice of what is notorious, of what everybody knows. Indeed, I came across recently in an entirely different connection a case in which the Privy Council took judicial notice of the existence of a particular class of contracts in India. That was in Gyanagerji's case. Now, how had their Lordships of the Privy Council acquired the knowledge of that class of contracts? Clearly, from having come across them so often in cases coming before their Lordships' Board on appeal. Similarly, we members of the judiciary sitting in these Courts cannot avoid acquiring a very considerable knowledge, from the cases that come before us, of the activities and the prevalence of secret societies and, in particular, in this town of Ipoh. Every day, or almost every day, week after week, and month after month, I open my morning paper and this is the sort of thing I read (I know it would not be evidence in the case when the accused was being prosecuted for the offence but it is a sample of what is common knowledge): (His Lordship reads three items from the Straits Times of 16th June).

And so it goes on, and almost every day of the week we read of gangs of young thugs entering private dwellings, shops, coffee houses and so forth and inflicting very severe injuries upon their victims.

Now, how does that connect with what I have just said about a class of cases in which although no violence is used violence is undoubtedly involved? Because it is purely fortuitous that in a case of this kind no violence is used. The threat itself is sufficient. These gangsters have gained the upper hand over law-abiding citizens who are so terrified of them that they do not dare to resist their demands. We all know perfectly well what would happen to any member of the public who refused to play the game according to the secret society rules. We read day after day of the finding of arsenals of weapons – exceedingly dangerous and

A often lethal weapons – belonging to these gangsters. They have only got to go into a shop and demand a sum of money which is a multiple of three, like $36 or $108, and the implied threat is sufficient because those are the numbers which are used by the secret societies in their extortion demands; and naturally no actual violence or brutality is used for the simple reason that the victim of the demand is not going to run the risk, for the sake of a few dollars, of having himself carved up with parangs or battered with bicycle chains. In that class of cases, then, as it appears to me, the thug who has not had occasion to implement his threat of violence deserves corporal punishment just as much as if he had inflicted it.

[67] In *Low Thim Fatt v. Public Prosecutor* [1989] 1 MLJ 304 at p. 306, His Lordship Zakaria Yatim J (as he then was) said:

On the question of sentence the court must bear in mind that the appellant had committed a vicious crime. When the robbery was committed at the complainant's house, the appellant was armed with a pistol. His three other friends were also armed with pistols and a knife. The learned president was right when she stated in her grounds of judgment that this type of crime is now very rampant: see *PP v. Lee Tak Keong*. The public interest should be protected and in order to protect the public interest a deterrent sentence must be passed. In this case the crime was premeditated. The learned president had indeed passed a deterrent sentence in this case. In her grounds of judgment, she said, 'I have to pass a deterrent sentence in this case as this sort of offence is now very rampant in this country and in this case, the whole family was put in fear.' In passing a deterrent sentence, the learned president took into consideration the mitigating factors pleaded by the appellant's counsel as well as the submission made by the prosecuting officer.

Plea Of Guilty

[68] Ordinarily a plea of guilty has been treated as a mitigating factor since it saves judicial time in conducting a lengthy trial but it also saves time and inconvenience of many, particularly the witnesses. (See *Melvani v. Public Prosecutor* [1971] 1 MLJ 137, *Sau Soo Kim v. Public Prosecutor* [1975] 2 MLJ 134, *Loh Hock Seng & Anor v. Public Prosecutor* [1980] 2 MLJ 13, *Public Prosecutor v. Leo Say & 2 Ors* [1985] 2 CLJ 155; [1985] CLJ (Rep) 683, *Mohamed Abdullah Ang Swee Kang v. Public Prosecutor* [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 SC, *Public Prosecutor v. Ravindra a/l N. Rethinam & 5 Ors* [1992] 4 CLJ 2043; [1992] 3 CLJ (Rep) 426, *Tan Lay Chen v. Public Prosecutor* [2000] 4 CLJ 492). The court

has recognized that a plea of guilty is ordinarily a consideration to be taken into account in mitigation of punishment but it must be made clear that it is not the law that a sentencing Judge must exercise a discretion to provide a non-custodial sentence in every case of plea of guilty as each case is dealt with on its own individual merits and should not be assumed mechanically that it will be spared the custodial sentence. A plea advanced on counsel's advise late in the day, because a conviction is almost inevitable, will be given less weight than one advanced from arrest or committal, on the first day he is charged in court to save witnesses from the trauma of a trial or to reduce court delays. (See *R v. Lawrence* [1980] 1 NSWLR 122) *Laurentiu* [1992] 63 A Crim R 402).

[69] In the instant case, the plea of guilty was not entered at the first reasonable opportunity when the accused was charged on 21 October 2000 at the Magistrate's Court but about four years later. Therefore, the extent of which a plea of guilty may be taken into consideration in mitigation depends to what extend the plea is indicative of the remorse, acceptance of responsibility and willingness to facilitate the course of justice. (See *Cameron v. The Queen* [2002] 209 CLR 339). In appropriate cases, the court may also refuse to give discounts in sentence since it is not a strict rule to be applied in all cases. (See *Public Prosecutor v. Teh Ah Cheng* [1976] 2 MLJ 186 at p. 187, *Public Prosecutor v. Loo Choon Fatt* [1976] 2 MLJ 256, *Public Prosecutor v. Leo Say & 2 Ors* [1985] 2 CLJ 155; [1985] CLJ (Rep) 683, *Zaidon Shariff v. Public Prosecutor* [1996] 4 CLJ 441, *Public Prosecutor v. Govindnan a/l Chinden Nair* [1998] 2 CLJ 370, *Ang Chai Seng v. Public Prosecutor* [2000] 1 CLJ 213). It is important to observe that it is not a strict rule that in every case where the accused has pleaded guilty and is a first offender, a non custodial sentence must be ordered as in appropriate cases the court may refuse to invoke s. 294 Criminal Procedure Code where the severity of the offence committed may outweigh the mitigating effect of a guilty plea or the public interest and justice demand custodial sentence in the circumstances of a particular case where the first offence is itself grave, there is no reason to make a concession to human frailty and this factors should not influence the court in exercising its discretion in accordance with settled judicial principles. There must be a fair balance between the interests of the accused on the one hand and the interests of the public on the other.

[70] In *Liaw Kwai Wah & Anor v. Public Prosecutor* [1987] 1 CLJ 35; [1987] CLJ (Rep) 163, His Lordship Abdul Hamid CJ (Malaya) (as he then was) said:

> 'Discretion' means that when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion: *Rooke*'s Case [1958] 5. Co. Rep. 996); according to law, and not humour. It is to be, not arbitrary, vague, but legal and regular. And it must be exercised within the limit to which an honest man competent to the discharge of his office ought to confine himself: *Wilson v. Rastall* [1792], 4 Term Rep. at p. 757). (*Sharp v. Wakefield* [1891] AC 173, HL, per Lord Halsbury, LC at p. 179.)
>
> *Maxwell on The Interpretation of Statutes*, 12th Ed., at pp. 147-8, under the Heading "The exercise of discretion must be reasonable," states that:
>
> Even though an act done is ostensibly in execution of a statutory power and within its letter, it will nevertheless be held not to come within the power if done otherwise than honestly and within the spirit of the enactment. A discretion is to be 'regulated according to known rules of law, (*Lee v. Bude & Torrington Junction Ry. Co.* [1871] LR 6 CP 576, per Willes J at pp. 580, 581), and not the mere whim or caprice of the person to whom it is entrusted on the assumption that he is discreet ... 'It is true,' said Lord Greene M.R. in *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corporation* [1948] 1 KB 223, at p. 229), 'the discretion must be exercised reasonably.'
>
> The principles which should guide the courts in the exercise of the revisionary powers have been clearly set out by Jenkins C.J. in *Emperor v. Lachiram*. In that case his Lordship said that "this controlling power of the court is a discretionary power and it must be exercised with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances, which vary greatly.

[71] In *Fan Yew Teng v. Public Prosecutor* [1975] 2 MLJ 235 at p. 238, His Lordship Lee Hun Hoe CJ (Borneo) said:

> In any civilised society there must be law and order which are the prerequisites to the advancement of harmonious living and human happiness.
>
> The last ground is that the sentence is excessive. In deciding appropriate sentence the first and foremost consideration is the public interest. The law does not fix the sentence for a particular

offence but fixes a maximum sentence and leaves it to the trial court to decide what is, within that maximum, the appropriate sentence in the particular circumstances of each case. Therefore, before passing sentence the trial court hears evidence of antecedents and character of every convicted person.

[72] In *Public Prosecutor v. Khairuddin* [1981] CLJ 86; [1981] CLJ (Rep) 234, His Lordship Mohamed Azmi J (as he then was) said:

Although a trial court has the discretionary right and the duty to decide whether to be lenient or severe, such discretion and duty must be discharged according to established principles of assessing sentence.

[73] In *Bhandulananda Jayatilake v. Public Prosecutor* [1982] 1 MLJ 83 at p. 84, Raja Azlan Shah Ag. LP (as His Royal Highness then was) said:

... the very concept of judicial discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable.

For a discretionary judgment of this kind to be reversed by this court, it must be shown to our satisfaction that the learned judge was embarking on some unauthorised or extraneous or irrelevant exercise of discretion. We are far from convinced that any criticism of the learned judge is warranted. He took the course he did, in outweighing the plea of mitigation in favour of the public interest with a desire to uphold the dignity and authority of the law as administered in this country. We agree. That must receive the greatest weight. It is a serious offence to give false testimony, for it is in the public interest that the search for truth should, in general and always, be unfettered. The courts are the guardians of the public interest (see the *Exclusive Brethren* case).

Judicial Notice

[74] The court has also the discretion to take judicial notice of the fact of the prevalence and increase of certain species of crime. (See *Public Prosecutor v. Rajandran & Anor*. [1985] 2 MLJ 260, *Ong Lai Kim v. PP And Other Appeals* [1991] 2 CLJ 1568; [1991] 3 CLJ (Rep) 376, *Public Prosecutor v. Mustapha bin Abdullah* [1996] 3 CLJ 458, *Teo Chin Hwa v. Public Prosecutor* [2000] 1 CLJ 224).

[75] In *Lee Chow Meng v. Public Prosecutor* [1976] 1 MLJ 287 at p. 288, His Lordship Abdul Hamid J (as he then was) said:

A What matters constitute common and general knowledge may be gathered from *Sarkar on Evidence*, 12th edition, where the learned author, speaking of common knowledge, at page 575, said:

The matter of which a court will take judicial notice must be a subject of common and general knowledge. In other words, B judicial knowledge of facts is measured by general knowledge of the same facts. A fact is said to be generally recognised or known when its existence or operation is accepted by the public without qualification or contention. The test is whether sufficient notoriety attaches to the fact involved as to make it proper to assume its C existence without proof.

In the light of the passage cited it is clear that the court may properly ask itself this question: is it not a fact well recognised that in Kuala Lumpur there has been of late, an increase in the commission of offences involving firearms? We are not concerned D with absolute acceptance of the existence of certain knowledge. The rule of evidence speaks of general recognition and not total recognition in the sense that there is a general acceptance without qualification or contention as opposed to total acceptance.

Sarkar on the same page has something to say concerning the E notorious facts:

Judicial notice is taken of various facts which are familiar to any judicial tribunal by their universal notoriety or regular recurrence in the ordinary course of nature or business. As judges must bring to the consideration of questions they have to decide their F knowledge of the common affairs of life, it is not necessary on the trial of an action to give formal evidence of matters with which men of ordinary intelligence are acquainted ...

Matters which the court may take judicial notice are far from G exhaustive. Courts have even taken judicial notice that streets in London are crowded and dangerous – *(Dennis v. White)*; and of world wide economic depression – *(Ram Tarak v. Selgrant)*.

In this connection let me also refer to the case cited by Encik T.S. Sambanthamurthi *(Yong Pak Yong v. Public Prosecutor)* where H Good J (as he then was) said at page 177:

In dealing with a matter of sentence as distinct from considering whether a person ought to be convicted or not of the offence, I think that the courts are entitled to take judicial notice of what is notorious, of what everybody knows. Indeed, I came across I recently in an entirely different connection a case in which the Privy Council took judicial notice of the existence of a particular class of contracts in India.

Further on His Lordship said:

> Similarly we members of the judiciary sitting in these courts cannot avoid acquiring a very considerable knowledge, from the cases that come before us, of the activities and the prevalence of secret societies and, in particular, in this town of Ipoh.
>
> Similarly I would say that it is common knowledge that, of late, commission of offences involving fire-arms has been prevalent in Kuala Lumpur and I think the court is entitled to take judicial notice of that fact.

Appellate Jurisdiction On Sentence

[76] In *Leong Ka Kong v. Public Prosecutor* [1976] 2 MLJ 21 at p. 22, His Lordship Abdul Hamid J (as he then was) said:

> Insofar as this court is concerned, in exercise of its appellate jurisdiction, it shall consider whether the sentences of the court below were wrong in law or were they manifestly excessive on the facts and circumstances justifying interference. It is settled law that sentences should not be interfered with by the appellate court merely because the individual presiding in the higher court might, having personal views on the matter, have passed a different sentence.
>
> Our system, as practised today, has vested the magistrate and presidents with wide discretionary power in the matter of the amount of punishment. Such discretionary power must not, however, be exercised in complete disregard of the facts and circumstances of the case. In point of fact, the discretion must be exercised judicially. Now, in consideration of what I have said, the court should not therefore interfere with the lower court's discretion unless there is apparent on the fact of the record a manifest error either in law, or, in considering the facts and circumstances of the case. The nature of the offences committed in particular that which is violent in nature and one that involves the security of life and property, must necessarily be viewed gravely.
>
> Robbery, especially one in the commission of which deadly weapon or weapons are used is a crime which not only involves disastrous consequences to others but afford evidence of the odious qualities of the person who commits it. Crimes involving great moral atrocity as well as great public mischief should be met with deterrent sentences.

A In the instant case, the learned president quite rightly considered not only the nature and gravity of the offences committed by the appellant but also the facts and circumstances surrounding the case. The learned president, also considered what is common knowledge namely the fact that there has been an increase of crime in Kuala Lumpur.
B

[77] In *Liow Chow And Another v. Public Prosecutor* [1939] 8 MLJ (F.M.S.R.) 170 at p. 171, Poyser, CJ, McElwaine, CJ (S.S.) and Terrell, JA said:

C The sentence of the Court of first instance should not be altered unless the appellate Court considers the sentence unjust. An Appellate Court must reject "the lore of nicely calculated less or more" in matters of sentence. Before the sentence is altered it must be manifestly wrong, wrong either in the sense of being illegal or of being unsuitable to the proved facts and circumstances.
D

[78] In *Tan Koon Swan v. Public Prosecutor* [1987] 1 CLJ 511; [1987] CLJ (Rep) 1081, His Lordship Wee Chong Jin CJ said:

First, it is appropriate to state the principles upon which this
E Court, as an appellate court, should act when considering an appeal as to the sentence imposed by a trial court. It is axiomatic that each case depends on its own facts. It is also an elementary principle that an appellate court can and will interfere if the sentence imposed was not justified by law. Mr. Knight has referred us to a passage in Archbold, which we accept, setting out
F the principles upon which an appellate court acts.

One principle is that the Court can interfere if it is satisfied that the sentencing Judge has made the wrong decision as to the proper factual basis for sentence. In relation to this principle, it has not been shown to our satisfaction by Mr. Karthigesu, who
G has related in detail the facts which were put before Lai Kew Chai J. that he imposed the sentence on a basis other than the proper factual basis. It is to be observed that the facts set out in the Statement of Facts which was read out to the learned Judge were unequivocably accepted by the appellant.

H Another principle is that the Court can interfere where it is satisfied that there has been an error on the part of the trial Judge in appreciating the material placed before him.

Sentence According To Law

I **[79]** In *Public Prosecutor v. Jafa bin Daud* [1981] 1 MLJ 315 at p. 316, His Lordship Mohamed Azmi J (as he then was) said:

A "sentence according to law" means that the sentence must not only be within the ambit of the punishable section, but it must also be assessed and passed in accordance with established judicial principles.

[80] In *Tan Lay Chen v. Public Prosecutor* [2000] 4 CLJ 492 at pp 496-497, His Lordship Augustine Paul J (as he then was) said:

The phrase 'pass sentence according to law' in the subsection means that the sentence imposed must not only be within the ambit of the punishable section but it must also be assessed and passed in accordance with established judicial principles (see *Re Chang Cheng Hoe & Ors* [1966] 2 MLJ 252, *PP v. Jafa bin Daud* [1981] 1 MLJ 315; *Philip Lau Chee Heng v. PP* [1988] 3 MLJ 107). The assessment of a sentence in accordance with judicial principles clearly contemplates, *inter alia*, a consideration of the mitigating circumstances in favour of the person to be sentenced. It is generally accepted that an accused person should be given credit or discount for pleading guilty (see *Sau Soo Kim v. PP* [1975] 2 MLJ 134; *PP v. Sulaiman bin Ahmad* [1993] 1 MLJ 74; *PP v. Ravindran & Ors* [1993] 1 MLJ 45). However, this is not a strict rule as the court may, in the exercise of its discretion, refuse to grant any discount in an appropriate case (see *Zaidon Shariff v. PP* [1996] 4 CLJ 441; *Lee Say & Ors v. PP* [1985] 2 CLJ 155). The severity of the offence committed may outweigh the mitigating affect of a guilty plea (see *Loh Hock Seng v. PP* [1980] 2 MLJ 13, *PP v. Oo Leng Swee & Ors* [1981] 1 MLJ 247). Where public interest demands a deterrent sentence in the circumstances of a particular case, then the effect of a guilty plea must also give way (see *Sim Gek Yong v. PP* [1995] 1 SLR 537; *R v. Costen* [1989] 11 Cr App R (S) 182). Thus, there can be no automatic rule that a guilty plea on its own entitles an accused to a lesser punishment (see *PP v. Govindnan a/l Chinden Nair* [1998] 2 MLJ 181). Be that as it may, as I said earlier it must not be overlooked that the general rule is that an accused should be given a lesser punishment for pleading guilty. There can, as I have said, be a departure from this general rule. However, there must be good reasons for doing so. In that event the reasons for such departure must be kept in mind. If, therefore, a sentence is imposed without taking into consideration a guilty plea then the reasons for doing so must be explained by the sentencer. This is because an accused person expects the general rule to operate in his favour when he pleads guilty. The grounds of judgment must therefore show why the guilty plea cannot, on the facts of the case, be considered as a mitigating factor. Failure to do so will lead to the criticism, as in this case, that the plea has not been

taken into account in imposing sentence. In this case the learned sessions court judge had not explained why he had disregarded the guilty plea, and, by the same process of reasoning, the clean record of the accused. This is a misdirection in law.

Binding Over Under s. 294

[81] The principles underlying s. 294 of the Criminal Procedure Code is that it cannot be invoked or operated under any circumstances nor that it is general in character and universal in its application but it must be distinguished and applied sparingly to accused who deserved to be considered on the facts and any extenuating circumstances under which the offence was committed and who are within the ambit of s. 294 of the Criminal Procedure Code.

[82] In *Jayanathan v. Public Prosecutor* [1973] 2 MLJ 68 at p. 69, His Lordship Ong Hock Sim FJ said:

> This section vests the court before which a person is convicted with power to suspend sentence for such period as the court may direct, and, if the offender behaves himself during such period, he would escape punishment for his offence. If he fails to observe the conditions of his bond, he would be liable to be apprehended and dealt with for his original offence. As Thomson J (as he then was) said in *Public Prosecutor v. Idris:*
>
> Section 294 which only applies in the case of adult offenders can only be made use of where a person has been convicted and where his conviction is for an offence punishable with imprisonment without the option of a fine.
>
> I do not wish to lay down any hard and fast rule, which in any event would be difficult to prove, but magistrates would be well-advised only to make use of section 294 where an offence which is generally of a serious nature and which is punishable with imprisonment has been committed by an adult offender and where it is considered desirable to place him on probation.

[83] In *Public Prosecutor v. Fam Kim Hock* [1957] 23 MLJ 20, His Lordship Buhagiar J said:

> It is an establish principle that the sentence of the Court of first instance should not be altered unless it is manifestly wrong, wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances (see *Liow Chow v. Public Prosecutor*). It is clear as Thomson J pointed out in *Public Prosecutor v. Lim Guan Hock*, that the provisions of section 294 of

A

the Criminal Procedure Code do not allow any Court to go to the length of saying that in every case of first offender the antecedents of the convicted person are necessarily such as to make it expedient to bind him over; each individual case must be considered on its own merits.

B

The offence is by no means of a trivial nature but the points mentioned in the above section are intended by the legislature to indicate the lines on which the discretion of the Court should be exercised. In applying the provisions of section 294 in the present case the learned President took into consideration the fact that the respondent was a first offender, the circumstances under which the offence was committed and that it was quite clear that the parties themselves would welcome a settlement.

C

[84] In *Public Prosecutor v. Lim Guan Hock* and *Public Prosecutor v. Boo Swee Kim* [1949] 15 MLJ 231, His Lordship Thomson J (as he then was) said:

D

... the provisions of s. 294 of the Criminal Procedure Code do not allow any Court to go to the length of saying that in every case of a first offender the antecedents of the convicted person are necessarily such as to make it expedient to bind him over. Each individual case must be considered on its own merits and must be examined with a view to ascertaining whether, having regard to any of the matters mentioned in s. 294 of the Criminal Procedure Code, binding over is in all the circumstances of the case expedient.

E

F

[85] In *Public Prosecutor v. Yap Chong Fatt* [1963] MLJ 136, Thomson CJ (as he then was) at p. 137 said:

Normally in the case of a young adult hitherto of good character where his first offence is not of great intrinsic gravity the proper course is to put him on probation. If the offence is too serious for that and merits imprisonment then a sentence of imprisonment should be imposed which will have some effect not only on the offender but also as a deterrent and which will give the Prisons Department some opportunity of trying to remedy such defect of character as there may be.

G

H

1/3 Rule Of The Maximum Imprisonment

[86] In *Low Oi Lin v. R* [1949] MLJ 210, Taylor J said:

I

I would add that it is very doubtful whether the principle of one-third of the maximum imprisonment was ever generally applied in the Supreme Court; ...

A It is impossible to lay down rules for fixing sentences. There are certain factors such as prevalence, difficulty of detection and injury to the public revenue which operate in the direction of severity and others such as leniency to first offenders which operate in the other direction and where, as frequently happens, a number of these factors apply in one case the court must balance them as best as it can.

The sentence ought to be an individual one, personal to the prisoner himself, assessed with regard to his moral and financial circumstances as well as to the nature of his offence.

C And I would add the courts should have greater regard for the offence, the circumstances of the case, the public interest and the reformation of the offender.

[87] However, in *Sharon Elizabeth Costen* [1989] 11 Cr. App. D R.(S.) 182, it was held that:

The general principle of discount had been examined in a number of cases. *In Barnes* [1983] 5 Cr. App. R.(S.) 368 the Court had reduced a sentence of seven years' imprisonment (then the maximum) for attempted rape on the ground that the appellant E had pleaded guilty. Other cases recognised exceptions to the general principle. The first and most important was where the protection of the public made it necessary that a long sentence, possibly the maximum sentence, should be passed; in such cases a plea of guilty did not necessarily result in a discount, as was F illustrated by *Stabler* [1984] 6 Cr. App. R.(S.) 129 where the appellant, who was suffering from an-untreatable personality disorder, committed a series of indecent assaults on women on the same day. The same point was made in *Sullivan* [1987] 9 Cr. App. R.(S.) 492, where in the event a small discount was allowed. A second circumstance in which a discount might be G reduced or forfeited was the case of what was called a "tactical plea," as exemplified by *Hollington and Emmens* [1985] 7 Cr. App. R. (S.) 364. Where an offender delayed his plea until the final arrangement, in a case where he could not hope to put up much of a defence, he could not expect much by way of discount. H Finally, where an offender was caught red-handed and a plea of guilty was practically certain, any discount might be reduced or lost: an example was *Morris* [1988] 10 Cr. App. R.(S.) 216. In the present case, the sentencer took the view that he was justified in passing the maximum sentence available to him under the statute, two years, as the charge was representative of a larger I number of offences. It might be that this represented another exception to the general rule of discounts for pleas of guilty: there might very well be occasions when it was proper to decline to

> give a discount, where the count was a specimen. The question was whether in the present case the appellant should have received the maximum sentence: the Court doubted whether she should. The appellant was a woman of low mentality, she had lost her four children as a result of the offences, and she had nothing to lose by fighting the case: by refraining from doing so she had exonerated the girl from the further trauma of giving evidence. In the circumstances, the Court considered that a discount should have been given, although it could only be a small one. The sentence would be reduced to 21 months' imprisonment. (See *Muhamed Abdullah Ang Swee Kang v. Public Prosecutor* [1988] 1 MLJ 167)

[88] In cases where the offender pleads guilty the court in considering what is the appropriate sentence and in accordance with established judicial precedents must consider the facts of the case presented by the prosecution and the mitigating circumstances and of course to have the public interest as the foremost consideration. The order of binding over on the facts and the nature of the offence would not only send a wrong signal or message to would be offenders of such crime but no doubt would be an encouragement to such offenders to commit crime and that they would escape the custodial sentence. It is important to consider that it is not only the offender to be deterred by the imposition of an appropriate custodial sentence but others who might be tempted to offend in a similar way. In *Ahmad bin Haji Bakar v. Public Prosecutor* [1988] 2 MLJ 216 at p. 217, His Lordship Roberts CJ said:

> In *Taib bin Gemok v. Public Prosecutor*, the public interest does require that a sentence of imprisonment, sufficient to deter not only the accused but other persons of a like mind, shall be imposed in cases of this kind.

[89] In the instant case, the offence was not trivial and there were no extenuating circumstances in the commission of the offence of robbery for the accused to escape custodial sentence. Over emphasis by the learned Magistrate on the individual interest of the accused and total disregard to public interest is a misdirection in law and merits interference by this court. Be that as it may, it is important to observe that if not for the speedy arrest by the police of the accused on the same day, the accused may not have been brought to justice and would have escaped arrest. As for the second accused, despite his arrest and detention, he resisted the arrest and ran away but for the efficient follow up

by the police who arrested him two hours later at Kampar. This court will not be fair if the police are not commended for the effective and early detection of crime, in the instant case, the arrest of both the accused has no doubt been geared to ensure that the law and order in the community may be maintained and preserved before there was an opportunity for other would be victims.

[90] In the instant case, the order of binding over under s. 294 of the Criminal Procedure Code by the learned Magistrate against such a serious offence of robbery armed with a parang and on the facts is an unwarrantable exercise of judicial discretion and has to be corrected. There has been an error of law and violation of the principles of sentencing. The interests of the administration of justice demand that a custodial sentence is more appropriate when considering the nature of the offence, the circumstances under which the offence was committed and the facts as admitted by the accused and the binding over under s. 294 of the Criminal Procedure Code is unsuitable to the admitted facts, circumstances and considering the mitigating factors. To invoke and apply the provision of s. 294 of the Criminal Procedure Code to the facts in the instant case and the nature of the offence being robbery armed with parang deadly weapon will be to give an extended meaning to the prerequisites for applying s. 294 of the Criminal Procedure Code.

[91] Every sentence passed shall take effect from the time when it is passed, unless the court otherwise directs. Thus, if the court does not specify the date for commencement although the court must specify the date for commencement, it will be deemed to date from the date of imposition. The ordinarily and the usual practice in this jurisdiction has been that allowance is made for pre-sentence custody and is exclusively referable to the crime for which the accused has been sentenced. In other words, s. 282 of the Criminal Procedure Code confers the power to the court to direct that the sentence may commence upon determinate date either subsequent or prior to the time when it is imposed. (See also *R. v. Clark* [1975] 27 FLR 380, *R. v. Longford* [1970] 71 S.R. (NSW) 288] However, there may be extraordinary circumstance, (eg, there was not a continuos period of custody from the accused's initial arrest) where the court chooses not to back-date a sentence in which case, it is only desirable that the

court should expressly state so and give its reasons for not doing so (See *English (Jason Wayne)* [2000] NSWCCA 245, *Close* [1992] 65 A Crim. R. 55 at p. 69 *R v. Mchugh* [1985] 1 NSWLR 558).

[92] Having regard to all the circumstances surrounding the commission of the offence, the order of binding over under s. 294 of the Criminal Procedure Code by the learned Magistrate was manifestly inadequate and cannot be sustained. This court has considered the submissions of the learned Deputy Public Prosecutor and the reply of the accused and mitigating circumstances put forward by the accused in both in their oral and written appeal, the nature of the offence and the prerequisite of the express provision of the s. 294 of the Criminal Procedure Code and is of the view that the order of binding over is not an appropriate and suitable order. (See *Public Prosecutor v. Nazarudin bin Ahmad* [1993] 2 MLJ 9 at p. 18).

[93] In the circumstances, the appeal by the learned Deputy Public Prosecutor against the sentence is allowed. The order of binding over under s. 294 of the Criminal Procedure Code as ordered by the learned Magistrate is set aside and substituted with the sentence of 30 months' imprisonment against both the accused and the sentence of imprisonment is to take effect from today. (See s. 284(d) of the Criminal Procedure Code)